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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~562.~~ ~~555~~ 108

WILLIAM B. DUNCAN, DAVID DUNCAN, AND WILLIAM WATTS SHERMAN, APPELLANTS,

vs.

MARY T. B. JAUDON.

No. ~~563.~~ ~~556~~ 109

THE NATIONAL CITY BANK, APPELLANT,

vs.

MARY T. B. JAUDON.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 14, 1871.

9/13/1871

SUPREME COURT OF THE UNITED STATES.

No. 562.

WILLIAM B. DUNCAN, DAVID DUNCAN, AND WILLIAM WATTS SHERMAN, APPELLANTS,

vs.

MARY T. B. JAUDON.

No. 563.

THE NATIONAL CITY BANK, APPELLANT,

vs.

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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a UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 294, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Mary T. B. Jaudon, against Samuel Jaudon, William B. Duncan, David Duncan, William Watts Sherman, The National City Bank, & Charles B. Jaudon, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 4th day of September, in the year of our Lord one thousand eight hundred and seventy-one, and of the independence of the said United States the ninety-sixth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[5-ct. int. rev. stamp, canceled.]

1 [L. S.] The President of the United States of America to Samuel Jaudon, William B. Duncan, David Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon, greeting:

You are hereby commanded that you, and each of you, personally appear before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit court, in equity, on the first Monday of December, A. D. 1869, wherever the said court shall then be, to answer a bill of complaint exhibited against you in the said court by Mary T. B. Jaudon, and to do further and receive what the said court shall have considered in that behalf. And this you are not to omit, under the penalty on you and each of you of two hundred and fifty dollars.

Witness Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, on the 12th day of October, in the year one thousand eight hundred and sixty-nine, and of the independence of the United States of America the ninety-fourth.

KENNETH G. WHITE, *Clerk.*

STRONG & SHEPARD, *Sol'rs.*

The defendants are required to enter appearance in the above cause in the clerk's office of this court on or before the first Monday of December, 1869, or the bill will be taken pro confesso against them.

K. G. W., *Clerk.*

2 (Indorsed:) Filed Oct. 27, '69.

Personally served on the within-named defendants, Samuel Jaudon, William B. Duncan, William W. Sherman, presd't of City Bank. Others not found.

FRANCIS C. BARLOW,
U. S. Marshal.

OCT. 27, '59.

3 United States circuit court, southern district of New York.
In equity.

To the judges of the circuit court of the United States for the southern district of New York:

1. Mary T. B. Jaudon, who is a resident of the city of Philadelphia, in

the State of Pennsylvania, and is a citizen of the State, by Henry M. Taber, her next friend, brings this her bill of complaint against Samuel Jaudon, William B. Duncan, David Duncan, and William Watts Sherman, each of whom is a resident of the city of New York, in the State of New York, and a citizen of the State of New York, the three last-named of whom transacted business in the said city of New York in the firm-name of Duncan, Sherman & Co., The National City Bank, which is a banking association and corporation, created and organized under an act of Congress of the United States, existing in and a citizen and resident of the State of New York, doing business in the city of New York, and Charles B. Jaudon, who is a resident of the said city of Philadelphia, and a citizen of the State of Pennsylvania.

2. And thereupon your oratrix complains, and says that she is the wife of the said Charles B. Jaudon, and has and owns a separate estate and property to her sole and separte use and benefit, free from
4 all right, control, or claim of her said husband, and hereinafter mentioned; and that the said Mary T. B. Jaudon is a daughter of the late Commodore Bainbridge, of the city of Philadelphia, who died in the year 1833, leaving a will, which was duly proved in the office of the register of wills in and for the city and county of Philadelphia, on the 2d day of August, 1833.

3. The said testator, in his will, after bequeathing certain specific legacies, appointed William Lynch and Hugh Calhoun trustees of the residue of his estate; and, amongst other things, directed them to invest a portion thereof in trust, the interest whereof to be paid to my daughter, Mary T. Bainbridge, for her sole use and benefit during her natural life, and at the end of her natural life, the amount so invested to be equally divided between her children.

The "daughter" named in this clause of the will is your oratrix.

4. The trustees who were named in said will were, afterwards, on their own petition, discharged from their trust, and, on the 29th day of May, A. D. 1835, the defendant, Samuel Jaudon, was appointed by the court of common pleas of the city and county of Philadelphia, as trustee in their stead, under the said will.

5. Said Samuel Jaudon, since his appointment as aforesaid, has
5 acted as, and still continues to be, the trustee of your oratrix, and as such, held, on or about the 21st day of October, A. D. 1867, for her benefit, amongst other things, one hundred and seventeen shares of the stock of the Delaware and Raritan Canal Company, of the par value of $100, each share, and of the actual value of over fourteen thousand dollars.

These shares were entered and stood upon the books of said company in the name of Samuel Jaudon, as trustee of your oratrix, and a certificate or certificates were issued and delivered to him for the said shares, showing on their face that they were issued to him as her trustee.

6. Said Samuel Jaudon also held, previous to, and on or about, the 15th day of June, A. D. 1868, as the trustee of your oratrix, and for her benefit, a certain amount, to wit, five thousand six hundred dollars of the United States loans, commonly called "five-twenties," with the interest coupons due after that date still attached thereto, of the value of more than $6,800 00.

7. At some time after the said United States loans came into his hands or possession—the date is to your oratrix unknown, but she prays that the defendant Samuel Jaudon, may be required to set it forth in his answer—the said trustee, in breach of the trust reposed in him, and

without the knowledge or consent of your oratrix, disposed of the
6 whole amount of the said United States loans, with the coupons thereto attached, and misappropriated the proceeds thereof to his own use and benefit; the same then amounting to and of the value of more than $6,800 00.

8. In the latter part of the year 1867 the said Samuel Jaudon, by the aid of the said Duncan, Sherman & Co. and of the said The National City Bank, the said firm and corporation being at the time informed of the fact that he held the aforesaid shares of the Delaware and Raritan Canal Company stock, as the trustee of your oratrix, contrary to his duties as such trustee, and in breach of his trust, disposed of and misapplied the said shares of stock, then being of the value as aforesaid, for his own benefit and use, and, as far as the greater part of the same is concerned, to the advantage and gain of the said Duncan, Sherman & Co. and The National City Bank, in a manner which will be more particularly set forth in the paragraphs immediately following.

9. At same time, believed by your oratrix to be in the month of October, 1867, but as to which she prays that the defendants shall be required to answer particularly, the said Samuel Jaudon pledged or hypothecated with the said Duncan, Sherman & Co. a certificate or
7 certificates for a part of the aforesaid shares of stock, held by him as trustee for your oratrix, and issued to him in his name as such trustee, to wit, seventy shares or thereabouts as security for the repayment to them—Duncan, Sherman & Co.—of a certain sum or sums of money then or previously loaned or furnished by them to the said Samuel Jaudon on his individual account. The certificate or certificates referred to showed upon their face that the shares of stock for which they called were not the property of the said Samuel Jaudon in his own right, but were held by him in trust for your oratrix, and the said Duncan, Sherman & Co. were bound to know that he had no right to pledge or dispose of them for his private benefit or use. At some time thereafter—your oratrix is not able to name the precise date, but prays that the defendants may be required to answer thereto particularly—the shares of stock just mentioned were, by the said Duncan, Sherman & Co., sold or caused or permitted to be sold, to some person or persons to your oratrix unknown, and the proceeds thereof were applied, with the knowledge of the said Duncan, Sherman & Co.; that they were produced in the manner just stated to extinguish the said private indebtedness of the said Samuel Jaudon to them; that the said seventy shares or thereabouts of the said stock were then of the value of more than $9,000 00.

8 10. On or about the 5th day of December, 1867—your oratrix believes this to be the date, but asks that the defendants shall answer thereto particularly—the said Samuel Jaudon pledged or hypothecated with the said The National City Bank a certificate or certificates of certain other shares of the said stock, held by him and in his name as trustee of your oratrix, to the number of forty-seven or thereabouts, as security for the repayment to the said bank of a sum or sums of money then or previously loaned or furnished by the said bank to the said Samuel Jaudon on his individual account. The certificate or certificates referred to showed upon their face that the shares of stock for which they called were not the property of the said Samuel Jaudon in his own right, but were held in trust for your oratrix, and the said bank was bound to know that he had no right to pledge or dispose of them for his own private benefit or use. At a subsequent date, unknown to your

oratrix, but which she prays the defendants may be required to set out in their answer, the shares of stock last mentioned were by the said bank sold, or caused or permitted to be sold, and transferred to some person or persons unknown to your oratrix, and the proceeds thereof were applied, with the knowledge of the said bank that they were produced in the manner just stated, to extinguish the said private indebtedness of said Samuel Jaudon to the said bank; that the said shares of stock were then of the value of more than $6,000 00.

11. That the matter in dispute herein exceeds $20,000 00, besides costs.

12. The foregoing statements embraced in paragraphs, numbered 8, 9, 10, are made upon information received by your oratrix, which your oratrix believes to be true.

13. Your oratrix further says, upon like information and belief, that she has, through her attorneys in this action, demanded of the said Duncan, Sherman & Co. that the said seventy shares or thereabouts of Delaware and Raritan Canal Company stock be restored to the said trust, together with all dividends since declared thereon, or that they pay the value of said stock and dividends, with interest; and also demanded of the said The National City Bank that the said forty-seven shares of *of* like stock be restored to the said trust, together with all dividends since declared thereon, or that it pay the value of said stock and dividends, with interest; each of which, the said firm and the said bank, refused to comply with the demand so as aforesaid made upon it respectively.

14. To the end, therefore, that the said defendants may, if they can, show why your oratrix should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledges, remembrances, information, and belief, full, true, direct, and perfect answers make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written they are respectively required to answer; that is to say:

That the defendants William B. Duncan, David Duncan, William Watts Sherman, and Samuel Jaudon, so answer:

1. Whether the said Samuel Jaudon pledged or hypothecated with the said Duncan, Sherman & Co. a certificate or certificates for a part of the aforesaid shares of stock of the Delaware & Raritan Canal Company, to wit, seventy shares or thereabouts, or any number; and whether the number of shares of stock was seventy or thereabouts, stating the number, and whether they were so pledged or hypothecated in October, 1867; and if not, when, stating the time.

2. Whether the certificate or certificates mentioned in the first interrogatory purported to have been issued to the said Samuel Jaudon in his name as trustee for Mrs. Mary T. B. Jaudon; and if not, state how otherwise.

3. Whether said Samuel Jaudon pledged or hypothecated the certificate or certificates mentioned in the first and second interrogatories to Duncan, Sherman & Co. as security for the payment to the firm of moneys loaned or furnished by them to the said Samuel Jaudon; and if not, how otherwise.

4. Whether the moneys mentioned in the third interrogatory were loaned or furnished in October, 1867, and when they were so loaned or furnished, stating the items and dates particularly, and to whom, and upon whose account.

5. Whether the certificate or certificates showed upon their face that the shares of stock were held by the said Samuel Jaudon in trust for any person; if so, for whom.

6. Whether Duncan, Sherman & Co. did sell, or cause, or permit to be sold, or transferred, the said shares of stock; if so, to whom they were sold or disposed of; for what account; how were the proceeds applied; were they applied to an indebtedness of Samuel Jaudon; when was that indebtedness contracted; or how otherwise were they applied.

That the defendants The National City Bank and Samuel Jaudon so answer:

7. Whether the said Samuel Jaudon pledged or hypothecated with said bank a certificate or certificates for certain shares of the Delaware and Raritan Canal Company stock, to wit, forty-seven shares, or thereabouts, or any number; if so, the number, and at what time.

12 8. Whether the certificate or certificates mentioned in the seventh interrogatory, purported to have been issued to the said Samuel Jaudon, in his name as trustee for Mrs. Mary T. B. Jaudon; or how otherwise.

9. Whether the said Samuel Jaudon pledged or hypothecated the certificate or certificates referred to in the seventh and eighth interrogatories to the said bank as security for the repayment to the bank of moneys loaned or furnished by the bank to the said Samuel Jaudon; or how otherwise.

10. Whether the moneys mentioned in the ninth interrogatory were loaned or furnished about the 5th of December, 1867, and when they were so loaned or furnished. State the items and dates particularly, to whom, and upon whose account.

11. Whether the certificate or certificates showed upon their face that the shares of stock were held by the said Samuel Jaudon in trust for any person; if so, for whom.

12. Whether the bank did sell, or cause, or permit to be sold or transferred the said shares of stock; if so, to whom were they sold or disposed of; for what sum; how were the proceeds applied; were they applied to an indebtedness of the said Samuel Jaudon; when

13 was that indebtedness contrated; or how otherwise were they applied.

And that the defendant Samuel Jaudon so answer:

13. Whether in breach of the trust reposed in him, and without the knowledge or consent of the said Mary T. B. Jaudon, he disposed of the said $5,600, or any or what amount of loans of the United States, commonly called "five-twenties," with the coupons thereto attached, and misappropriated the proceeds thereof to his own benefit, stating the time and times, and for what sum or sums.

And that your oratrix may have equitable relief, as follows:

I. That the defendant Samuel Jaudon may be decreed to account for the value of the United States securities so as aforesaid appropriated to his own use, together with all interest received, or that he might or should have received, and also account for the value of the one hundred & seventeen shares of stock so as aforesaid misappropriated by him, in breach of his trust, together with all dividends thereon; and that he be decreed to restore the said loans and stock to the trust, or that he be decreed to pay the value thereof, with all profits and interests,

14 into this court, to be subject to its disposition and control, which value your oratrix believes exceeds $22,000.

II. That the defendants Duncan, Sherman & Co. may be decreed to

account for and restore to the trust the said shares of stock hypothecated with them, and subsequently sold, together with all dividends since declared and interest, or that they be decreed to pay the value thereof into this court, which value your oratrix believes exceeds $10,000.

III. That the defendants The National City Bank may be decreed to account for and restore to the trust the shares of stock hypothecated with them and subsequently sold, together with all dividends thereon since declared, or that they be decreed to pay the value thereof into this court, which value your oratrix believes exceeds $6,600.

IV. That the defendant Samuel Jaudon may be dismissed from his trust, and another trustee appointed.

V. And that your oratrix may have such further relief, or may have such other relief, as the nature of her case shall require, and as shall be agreeable to equity.

May it please your honors to grant unto your oratrix a writ of subpœna ad respondendum, issuing out of and under the seal of this hon-
15 orable court, directed to the said Samuel Jaudon, William B. Duncan, David Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon, commanding them and each of them to appear and make answer to this bill of complaint; and further, to perform and abide by such order and decree herein as to this court may seem required by the principles of equity and good conscience.

And your oratrix will ever pray, &c.

NOTE.—The defendants Samuel Jaudon, William B. Duncan, David Duncan, and William Watts Sherman are required to answer the interrogatories respectively numbered 1, 2, 3, 4, 5, 6.

The defendants Samuel Jaudon and The National City Bank are required to answer the interrogatories numbered respectively 7, 8, 9, 10, 11, 12.

The defendant Samuel Jaudon is required to answer the 13th interogatory.

MARY T. B. JAUDON.

I consent to act as next friend for the plaintiff in the above-entitled suit.

HENRY M. TABER.

STRONG & SHEPARD,
Solicitors for Complainant.
T. R. STRONG,
Of Counsel.

16 STATE OF NEW YORK,
City of New York, ss:

On this 8th day of October, 1869, before me, personally appeared the above-named Mary T. B. Jaudon, and made oath that she has read the above bill subscribed by her and knows the contents thereof, and that the same is true of her own knowledge, except as to the matters which are therein stated to be on information and belief, and as to those matters she believes it to be true.

ALD'CE F. WALKER,
Notary Public N. Y. City & Co.

(Endorsed:) U. S. circuit court, southern district of New York.

Mary T. B. Jaudon vs. Samuel Jaudon et al. Bill of complaint. Strong & Shepard, sol'rs for pl'ff, 90 Broadway, N. Y. Filed October 12, 1869.

17 Know all men by these presents that I, Howard C. Phillips, of No. 72, *of* West 12th street, in the city of New York, am held and firmly bound unto Samuel Jaudon, William Butler Duncan, William Watts Sherman, The National City Bank, David Duncan, and Charles B. Jaudon, defendants, in the action hereinafter mentioned, in the sum of one hundred dollars, lawful money of the United States of America, to be paid to the said defendants or to their executors, administrators, successors, or assigns; for which payment, well and truly to be made, I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with my seal, dated the eighth day of October, in the year one thousand eight hundred and sixty-nine.

Whereas Mary T. B. Jaudon has commenced an action in the circuit court of the United States for the southern district of New York, against the said Samuel Jaudon, William Butler Duncan, William Watts Sherman, David Duncan, The National City Bank, and Charles B. Jaudon:

Now, the condition of the above obligation is such, that if the above-named Mary T. B. Jaudon shall discontinue her said action, or if it be dismissed or non prossed, or judgment goes against her therein, and if, in such case, she shall pay on demand all such costs as shall be
18 adjudged or awarded to the defendants in the said action, then the above obligation to be void; otherwise to remain in full force and virtue.

H. C. PHILLIPS. [L. S.]

Sealed and delivered in presence of—
ALDACE F. WALKER.

STATE, CITY, & COUNTY OF NEW YORK, *ss:*

Howard C. Phillips, the surety in the within bond, being duly sworn, says that he is a resident & householder in the State of New York, and is worth two hundred dollars over and above all debts, dues, demands, and encumbrances whatever, besides property exempt by law from execution.

H. C. PHILLIPS.

Sworn before me Oct. 8, 1869.

ALDACE F. WALKER,
Notary Public N. Y. City & Co.

CITY & COUNTY OF NEW YORK, *ss:*

I hereby certify that, before me personally came Howard C. Phillips, on the 8th day of October, A. D. 1869, known to me to be the individual described in, and who executed the within bond, and acknowledged that he executed the same.

ALDACE F. WALKER,
Notary Public N. Y. City & Co.

(Endorsed:) U. S. circuit court southern district of New York. Mary T. B. Jaudon vs. Samuel Jaudon & others. Bond. Non-resident plaintiff. Strong & Shepard, pl'ff's att'ys, No. 90 Broadway, N. Y. Filed Oct. 12, 1869.

19 U. S. circuit court southern district of N. Y. In equity.

MARY T. B. JAUDON
vs.
SAMUEL JAUDON, THE NATIONAL CITY BANK, & AL.

KENNETH G. WHITE, Esq., *Clerk:*

Please enter the appearance of The National City Bank, one of the defendants in the above cause, by us as solicitors.

New York, 1st Nov., 1869.

MERRIHEW & ARNOUX,
Solicitors for The National City Bank.

(Endorsed:) U. S. circuit court southern dist. N. Y. In equity. Mary T. B. Jaudon vs. Samuel Jaudon, The National City Bank, et al. Appearance of The National City Bank. Merrihew & Arnoux, solicitors. Filed Nov. 2, 1869.

20

21 *Notice of appearance.*

U. S. circuit court, southern district of New York.

MARY T. B. JAUDON
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, & William Watts Sherman.

SIR: Please to take notice that the defendant Samuel Jaudon, appears in this action, and that I am retained as attorney & solicitor for him therein, and demand that all papers in this action be served on me at my office, number 25 Pine street, N. Y.

New York, Dec'r 6, 1869.

Yours, &c.,

JOHN P. CROSBY,
Defendants' Att'y & Sol'r, 25 Pine Street, N. Y.

To STRONG & SHEPARD, Esq'r's,
Plaintiff's Attorneys.

K. G. WHITE,
Cl'k Circuit Court U. S., So' Dist. N. Y.

(Endorsed:) U. S. circuit court, so' dist. of N. Y. Mary T. B. Jaudon against Samuel Jaudon et al. Notice of appearance of def't Samuel Jaudon. John P. Crosby, sol. & attorney for defendant. 25 Pine st., N. Y. Filed Dec'r 6th, 1869.

22

23 *Notice of appearance.*

U. S. circuit court.

MARY T. B. JAUDON
against
WILLIAM B. DUNCAN, DAVID DUNCAN, WILLIAM Watts Sherman, impleaded with Samuel Jaudon and others.

SIR: Please to take notice that the defendants Duncan and Sher-

man, appear in this action, and that we are retained as solicitors for them therein.

Yours, &c.,

BOWDOIN, LAROCQUE & BARLOW,
Defendants' Attorney, No. 35 William Street.

To STRONG & SHEPARD, Esq'r's,
Plaintiff's Attorneys.
To KENNETH G. WHITE, Esq.,
U. S. Circuit Court Clerk.

(Endorsed:) U. S. circuit court. Mary T. B. Jaudon against William B. Duncan and others, impleaded with Samuel Jaudon. Notice of appearance of defendants. Bowdoin, Larocque & Barlow, sol'rs for defendant. To Kenneth G. White, esq'r., U. S. circuit court clerk. Filed Dec'r 6, 1869.

24

25 U. S. circuit court, southern district of New York.

MARY T. B. JAUDON
vs.
CHARLES B. JAUDON, IMPLEADED, &C.

Please enter my appearance for the defendant Charles B. Jaudon, impleaded, &c., in above-entitled action.

ALDACE F. WALKER,
Att'y for Cha's B. Jaudon, 90 Broadway, N. Y.

(Endorsed:) U. S. circuit court, southern district of N. Y. Mary T. B. Jaudon vs. Cha's B. Jaudon, impleaded, &c. Appearance. Aldace F. Walker, att'y for C. B. Jaudon, 90 Broadway, N. Y. Filed February 5, 1870.

26

27 United States circuit court, southern district of New York, in equity.

MARY T. B. JAUDON
vs.
SAMUEL JAUDON ET AL.

The demurrer of The National City Bank of the City of New York, impleaded herein under the name of the National City Bank, to the bill of Mary T. B. Jaudon, complainant.

This defendant, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur to the said bill, and, for causes of demurrer, showeth:

First. That it appeareth by the said bill that the same is exhibit against these defendants, and Samuel Jaudan, William B. Duncan, David Duncan, and William Watts Sherman, for several and distinct matters and causes—in many whereof, as appears by the said bill, this

defendant is not in any manner interested or concerned—by reason of which distinct matters the said plaintiff's said bill is drawn out to
28 a considerable length, and this defendant is compelled to take a copy of the whole thereof; and, by joining distinct matters together which do not depend on each other in said bill; and that the said bill is altogether multifarious, and the pleadings, orders, and proceedings will, in the progress of said suit, be intricate, multifarious, and prolix, and these defendants put to unnecessary charges in taking copies of the same, although several parts thereof no way relate to or concern them.

Second. And for further cause of demurrer to the said complainant's said bill, showeth that it appears, by the said complainant's own showing in the said bill, that the owners of the residuary estate in the property in said bill mentioned and described are necessary parties to the said bill, inasmuch as it is therein stated that Commodore Bainbridge, the father of the complainant, directed the interest on the property specified to be paid to the complainant for her sole use and benefit during her natural life, and at the end of her natural life the amount so invested to be equally divided between her children, but yet the said complainant has not made the said children, or the owners of the residuary estate in default of said children, parties to said bill.

Third. And for further cause of demurrer to the said complain-
29 ant's said bill, showeth that the complainant has not legal capacity to sue these defendants in manner and form as in said bill set forth, inasmuch as it is therein stated that Commodore Bainbridge, the father of the complainant, in and by his last will and testament, appointed certain trustees of the residue of his estate, and directed them to invest a portion thereof in trust. the interest whereof to be paid to the complainant for her sole use and benefit during her natural life; and, that the successor in the trust held the property mentioned in said bill under and by virtue of such provisions, and that the title thereto and the right of action in respect to the matters in said bill alleged was in the said trustee and not in the said complainant; and that the said complainant has no right of action against these defendants by reason of the matters and things in said bill set forth, or by reason of any of them.

Wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any further or other answer to the said bill; and they pray to be hence dismissed with their reasonable costs in this behalf sustained.

MERRIHEW & ARNOUX,
Solicitors for Def'ts, The National City Bank of New York.

30 In the circuit court of the United States, for the southern district of New York, in equity.

MARY T. B. JAUDON
against
SAMUEL JAUDON & OTHERS.

CITY AND COUNTY OF NEW YORK, *ss*:

Benjamin Cartwright, being duly sworn, says that he is the cashier of the National City Bank of New York, one of the defendants; that the demurrer of the said The National City Bank of New York, to the bill of complaint of the above-named complainant in this suit, is not interposed for delay. And further saith not.

B. CARTWRIGHT, *Cas.*

Sworn to before me this 29th day of December, 1869.

In witness whereof I have hereunto set my hand and official seal on said date.

[SEAL.] GEO. FRANCIS DEMAREST,
Notary Public N. Y. Co.

31 In the circuit court of the United States for the southern district of New York, in equity.

MARY T. B. JAUDON
against
SAMUEL JAUDON & OTHERS.

I certify that, in my opinion, the demurrer of the defendants The National City Bank of New York, to the bill of complaint in this suit is well founded in point of law.

New York, December 29, 1869.

W'M HENRY ARNOUX,
Of Counsel for Defendants The National City Bank of New York.

(Endorsed:) U. S. circuit court for southern district of New York, in equity. Mary T. B. Jaudon ag'st Samuel Jaudon et al. Demurrer. Merrihew & Arnoux, attorn*ies* for The National City Bank of New York, 52 Wall st., New York. Filed Dec'r 30, '69.

32

33 In the circuit court of the United States for the southern district of New York, in equity.

MARY T. B. JAUDON
against
SAMUEL JAUDON & OTHERS.

The demurrer of William B. Duncan, David Duncan, and William Watts Sherman, to the bill of Mary T. B. Jaudon, complainant.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill contained to be true, in such manner and form as the same are therein and thereby set forth and alleged, do demur to the said complaint; and, for causes of *of* demurrer, show that it appears by the said bill that the same is exhibit against the defendants, and several other persons therein named as defendants thereto, for distinct matters and causes, in several whereof, as appears by the said bill, these defendants are not in any manner interested or concerned; and that the said bill is altogether maltifarious; wherefore, and for divers other good causes of demurrer appearing in said bill, these defendants do demur thereto. And they pray the judgment
34 of this honorable court whether they shall be compelled to make any other or fuller answer to the said bill. And they humbly pray to be hence dismissed with their reasonable costs in this behalf sustained.

BOWDOIN, LAROCQUE & BARLOW,
Solicitors for Defendants William B. Duncan, David Duncan, and William Watts Sherman.

W. W. MACFARLAND.
of Counsel.

35 In the circuit court of the United States for the southern district of New York, in equity.

MARY T. B. JAUDON
against
SAMUEL JAUDON & OTHERS.

CITY AND COUNTY OF NEW YORK, *ss:*

William Butler Duncan, one of the defendants, being duly sworn, says that the demurrer of the defendants William B. Duncan, David Duncan, and William Watts Sherman to the bill of complaint of the above-named complainant in this suit is not interposed for delay. And further saith not.

W. BUTLER DUNCAN.

Sworn to before me this twenty-eighth day of December, 1869.

In witness whereof I have hereunto set my hand and official seal on said date.

[SEAL.]

JOHN W. WEED,
Notary Public N. Y. County.

36

37 In the circuit court of the United States for the southern district of New York, in equity.

MARY T. B. JAUDON
against
SAMUEL JAUDON & OTHERS.

I certify that, in my opinion, the demurrer of the defendants William B. Duncan, David Duncan, and William Watts Sherman to the bill of complaint in this suit is well founded in point of law.

W. W. MACFARLAND,
Of Counsel for Defendants.

NEW YORK, *December* 28, 1869.

(Endorsed:) U. S. circuit court, southern district of New York. Mary T. B. Jaudon ag'st Samuel Jaudon & o'rs. Demurrer of defendants Duncan & Sherman. Bowdoin, Larocque & Barlow, def'ts' sol'rs.

This demurrer and that put in by The National City Bank overruled, with costs.

April 25, 1870.

S. B.

Filed Dec. 30, 1869.

38

39 Circuit court of the United States, southern district of New York.

MARY T. B. JAUDON
vs.
CHARLES B. JAUDON, IMPLE'DED WITH SAMUEL Jaudon & others.

The defendant Charles B. Jaudon, answering the bill of complaint of

Mary T. B. Jaudon, admits and says that the said Mary T. B. Jaudon is his wife, and that she has and owns a seperate estate and property to her sole and seperate use and benefit free from all right, control, or claim of him, the said Charles B. Jaudon, and that the matters set forth in said bill of complaint pertain to such seperate estate.

And further answering, the said Charles B. Jaudon admits and says that each and every statement and allegation in said bill of complaint contained is true, to the best of his knowledge, information, and belief.

4th February, 1870.

CHARLES B. JAUDON.

ALDACE F. WALKER,
Solicitor for Charles B. Jaudon.

40 (Endorsed:) U. S. circuit court, south. district of N. Y. Mary T. B. Jaudon vs. Charles B. Jaudon, impleaded, &c. Answer. Aldace F. Walker, sol'r for Cha's B. Jaudon, 90 Broadway, N. Y. Filed February 5, 1870.

41 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 26th day of April, 1870—Present, Hon. Samuel Blatchford, district judge.

MARY T. B. JAUDON, BY HER NEXT FRIEND,
vs.
SAMUEL JAUDON, W'M B. DUNCAN, DAVID DUNCAN, W'm Watts Sherman, The National City Bank, and Charles B. Jaudon.

The defendants William Butler Duncan, David Duncan, William Watts Sherman, and The National City Bank, having put in general demurrers to the bill of complaint in the above-entitled cause, and the same having been set down for argument, and coming duly on to be heard:

Now, after hearing W. W. McFarland, esq'r, and W'm H. Arnoux, esq., of counsel for said demurrers, and T. R. Strong, esq'r, of counsel for said complainant;

And, on motion of Strong & Shepard, esq'r's, solicitors for said complainant:

It is ordered that said demurrers be, and the same hereby are,
42 overruled, with costs to be paid to the said complainant by said defendants; and the defendants are required to answer the bill by the first Monday of June next; in default whereof it will be taken pro-confesso against them.

SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, S. D. of New York. Mary T. B. Jaudon vs. Samuel Jaudon & others. Order overruling demurrers. Strong & Shepard, sol'rs for compl't, 90 Broadway, N. Y. Filed April 30, 1870.

43 United States circuit court, southern district of New York. In equity. April 30, 1870.

MARY T. B. JAUDON, BY HER NEXT FRIEND,
vs.
SAMUEL JAUDON & OTHERS. } Strong & Shepard.

The defendant Samuel Jaudon, having duly appeared in this cause on

the 6th of December, 1869, but having failed to file any plea, demurrer, or answer to the bill filed herein October 12, 1869:

Now, on motion of Strong & Shepard, solicitors for the complainant, it is ordered that the said bill , and the same is hereby, now taken pro-confesso, as against the said defendant Samuel Jaudon.

44

45 United States circuit court, southern district of New York. In equity.

The joint and several answer of William B. Duncan, David Duncan, and William Watts Sherman, three of the defendants, to the bill of complaint of Mary T. B. Jaudon, plaintiff.

These defendants, respectively, now and at all times hereafter, saving to themselves all and all manner of benefit or advantage of exception, or otherwise, that can or may be had or taken to the many errors, uncertainties, and imperfections in said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, say that, on or about the eighteenth day of July, one thousand eight hundred and sixty-seven, Samuel Jaudon applied to the defendants, at their banking-house, in the city of New York, in the regular course of business, for a loan of seven thousand dollars, and offered as security therefor seventy shares of the stock of the Delaware and Raritan Canal Company. The application for said loan was made to the defendant William B. Duncan, in person, who, knowing the value of the stock, and knowing the security offered to be sufficient, directed the loan to be made, and thereupon the
46 certificates of the said shares of stock, having endorsed thereon a power of attorney in the usual form to transfer, duly executed by the said Samuel Jaudon, were handed to one of the clerks in the banking-house of these defendants, and the sum of seven thousand dollars advanced to the said Jaudon upon the pledge and security thereof. These defendants, nor either of them, made a careful examination of the said certificates, and did not observe, and had no knowledge, that the same were issued to the said Samuel Jaudon as trustee, as in the plaintiff's bill is alleged, but these defendants have been informed and believe the fact to be that the said certificates of stock were issued to the said Samuel Jaudon, as in the plaintiff's bill is charged, and that it appeared upon the face thereof that they were so issued. Afterwards, on the sixteenth day of October, one thousand eight hundred and sixty-seven, these defendants loaned to the said Samuel Jaudon the further sum of six hundred dollars upon the security of the said stock, making in all seven thousand six hundred dollars so loaned. The said stock was sold by these defendants, on or about the twenty-first day of October, by the direction of the said Samuel Jaudon, in the regular course of business; the amount realized therefor was eight thousand six hundred and
47 ninety-nine dollars and twelve cents. By the like direction of the said Samuel Jaudon, the amount loaned to him upon the security of the said stock, as aforesaid, amounting with interest to seven thousand seven hundred and twenty-nine dollars and eighty-eight cents, was deducted from the said proceeds, leaving a balance due to the said Samuel Jaudon of nine hundred and sixty-nine dollars and twenty-four cents, which, on the day last aforesaid, was paid to him by these defendants.

These defendants further severally answering, say that they had not at any time, and have not, any knowledge or information, of any actual or intended breach of trust on the part of the said Samuel Jaudon, in dealing as aforesaid with the said stock, nor did they have any reason to believe that any such breach of trust had been or would be committed by said Samuel Jaudon; and save, as hereinbefore stated, these defendants, respectively, have no knowledge or information in the premises whatsoever; and they respectively insist that they are bona fide purchasers of the said stock, for a good and valuable consideration, without any notice of any actual or intended breach of trust on the part of the said trustee, and without any other notice of the existence of any trust whatsoever, except so far, and so far only, as notice thereof is to be imputed to them by law upon the facts hereinbefore
48 stated. And these defendants respectively pray that they may have the same benefit and advantage in the premises, as they would be entitled to have if the facts alleged in this their answer had been pleaded in bar to the plaintiff's bill. And these defendants respectively deny all and all manner of unlawful combination and confederacy wherewith they are, by the said bill, charged, without this that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto, and not herein or hereby well or sufficiently answered, confessed, traversed, or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain, and prove, as this honorable court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

BOWDOIN, LAROCQUE & BARLOW,
Solicitors for Defendants William B. Duncan & others.

STATE OF NEW YORK,
City & County of New York, ss:

49 William B. Duncan, of said city, being duly sworn, says that he is one of the defendants in this action; that he has read the foregoing answer, and knows the contents thereof, and that the same is true, of his own knowledge, except as to the matters therein stated to be on information and belief, and as to those matters he believes it to be true.

W. BUTLER DUNCAN.

Sworn before me this 6th day of June, 1870.
In testimony whereof I have hereunto set my hand and affixed my official seal on the date last aforesaid.

JOHN W. WEED, [L. S.]
Notary Public New York County.

(Endorsed:) U. S. circuit court, in equity. Mary T. B. Jaudon against William B. Duncan & others, impleaded with Samuel Jaudon. Answer. Bowdoin, Laroeque & Barlow, att'ys for def'ts W. B. Duncan & others. Filed June 6, '70.

50

51 U. S. circuit court, southern district of New York.

MARY T. B. JAUDON
ag'st
THE NATIONAL CITY BANK, IMPLEADED WITH Samuel Jaudon & o'rs.

The answer of the National City Bank, impleaded herein with Samuel Jaudon and others, defendants, who appear herein, by Merrihew & Arnoux, their solicitors, to the bill of complaint of Mary T. B. Jaudon, complainant.

First. These defendants, reserving to themselves all right of exception to the said bill of complaint, for answer thereto admit that they are a banking association and corporation, created and organized under an act of Congress of the United States, existing in, and a citizen and resident of, the State of New York, doing business in the city of New York.

Second. That these defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth as their belief, or otherwise, whether the said complainant is or is not the wife of Charles B. Jaudon, and has or owns a separate estate and property to her sole and separate use and benefit, free from all right, control, or claim of her said husband or otherwise; or that she is the daughter of the late Commodore Bainbridge, of the city of Philadelphia; or
52 that he died in the year 1833; and, therefore, these defendants leave the said complainant to make such proof thereof as she may be advised.

Third. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth as their belief, or otherwise, whether the said Commodore Bainbridge left a will, which was duly proved in the office of register of wills in and for the city & county of Philadelphia, or elsewhere, on the 2d day of August, 1833, or at any other time, or that said will appointed the trustees or contained the directions in said complainant's said bill set forth; but for their greater certainty, nevertheless, as to said will, and the date of probate, purport, and effect thereof, these defendants pray leave to refer thereto when produced.

Fourth. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth as their belief, or otherwise, whether the trustees, who were named in said will, were at any time, on their own petition or otherwise, discharged from their trust; or whether, on the 29th day of May, A. D. 1835, or at any other time, the defendant, Samuel Jaudon, was appointed by the court of common pleas of the city & county of Philadelphia, or otherwise, a trustee in their stead, under the said will; and, therefore, leave
53 the said complainant to make such proof thereof as she may be advised.

Fifth. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth as their belief, or otherwise, whether the said Samuel Jaudon, since his alleged appointment, has acted as, and still continues to be, the trustee of the said complainant, or whether he, as such trustee or otherwise, held, on or about the 21st day of October, A. D. 1867, for her benefit, one hundred and seventeen shares of the stock of the Delaware and Raritan Canal Company, or whether said stock was of the par value of $100 each share, or whether the actual value thereof was over fourteen thou-

sand dollars, or whether these shares were entered and stood upon the books of said company in the name of said Samuel Jaudon, as trustee of the complainant, or whether a certificate or certificates were issued and delivered to him for the said shares, showing on their face that they were issued to him as her trustee; and, therefore, these defendants leave the said complainant to make such proof thereof as she may be advised.

Sixth. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth as their belief, or otherwise, whether the said Samuel Jaudon did or did not hold,
54 previous to or on or about the 15th day of June, A. D. 1868, or at any other time, as the trustee of the said complainant, and for her benefit, four thousand six hundred dollars, or any other amount of the United States loans, commonly called "five-twenties," or any other loan, with the interest coupons due after said last-mentioned date, or any other interest coupons still attached thereto of the value of more than $6,800, or any other value; and, therefore, these defendants leave the said complainant to make such proof thereof as she may be advised.

Seventh. These defendants know not, and have not been informed, save by the said complainant's said bill, & cannot set forth as their belief, or otherwise, whether the said Samuel Jaudon did or did not, in breach of the trust reposed in him, and without the knowledge or consent of the said complainant, or otherwise, dispose of the whole or any part of said United States loans; or whether he did or did not misappropriate the proceeds thereof, or any part thereof, to his own use and benefit; and, therefore, these defendants leave the said complainant to make such proof thereof as she may be advised.

Eighth. These defendants deny that, in the latter part of the year 1867, or at any other time, the said Samuel Jaudon, by the aid of
55 Duncan, Sherman & Co., and these defendants, or by the aid of either of them, contrary to his duties as such alleged trustee or otherwise, or in breach of his alleged trust or otherwise, disposed of and misapplied the said shares of stock, or any part thereof, for his own benefit and use, or to the advantage and gain of said Duncan, Sherman & Co., and these defendants, or either of them; and these defendants deny that said Samuel Jaudon, at the time alleged, or at any other time, informed these defendants that he held the aforesaid shares of stock as such trustee of the said complainant.

Ninth. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth upon their information and belief, whether the matter alleged in the ninth paragraph of said complainant's said bill are or are not true; and, therefore, leave the said complainant to make such proof thereof as she may be advised.

Tenth. These defendants admit that the said Samuel Jaudon pledged or hypothecated with these defendants a certificate of forty-seven shares of stock of the said Delaware & Raritan Canal Company, and that such certificate showed upon its face that the shares of stock for which they called were not the property of the said Samuel Jaudon in his own right, and that such shares were hypothecated, on or about the
56 21st day of October, 1866, and that, at a subsequent date, to wit, on or about the 14th day of January, 1867, the said shares of said stock were, by these defendants, sold or caused or permitted to be sold. These defendants deny that the said loan was made by these defendants to the said Samuel Jaudon on his individual account. These defendants deny that they were bound to know that said Samuel Jaudon had no right to pledge or dispose of said shares for his own private benefit or use; and they deny that they transferred the said shares to any person

or persons whomsoever. These defendants allege that, at the time of the said delivery of said certificate of stock to them by said Jaudon, and in consideration therefor, and other good considerations, these defendants paid to the said Samuel Jaudon the sum of $9,500, and they are informed and believe that said moneys were paid, laid out, and expended by said Samuel Jaudon for and on behalf of the purposes of the trust for which he held the same; and that, before such subsequent date, these plaintiffs duly demanded the repayment to them of said moneys so paid by them to same said Jandon, & the said Samuel Jaudon failed to repay the same; and thereupon, on said last-mentioned day, these defendants, with the consent and under the direction of said Samuel
57 Jaudon, caused the same to be sold, and reimbursed themselves, and repaid to said Samuel Jaudon whatever surplus remained after such repayment, interest, and expenses; and these defendants allege that such certificate of stock had a power of attorney endorsed thereon, and that the same was signed by said Samuel Jaudon, trustee; and these defendants thereupon delivered said certificate so endorsed and signed, and that the stock was transferred directly from said Samuel Jaudon, trustee, to such purchasers.

And these defendants deny that said shares of stock were then of the value of more than $6,000, or that the same exceeded in value the sum of $5,000.

Eleventh. These defendants know not, and have not been informed, save by the said complainant's said bill, and cannot set forth upon their information and belief, whether the matters alleged in the eleventh paragraph of said complainant's said bill are or are not true, except as hereinbefore set forth; and therefore leave the said complainant to make such proof thereof as she may be advised.

Twelfth. These defendants admit that the said complainant has demanded that these defendants restore the said shares of like stock to said trust, together with all dividends since declared thereon, or that they pay the value thereof, and that these defendants refused to comply with such demands.

Thirteenth. These defendants, upon their oath and to the best
58 and utmost of their knowledge, remembrance, information, and belief, full, true, direct, and perfect answers make to such interrogatories as by said complainant's said bill they are required to answer, as follows:

To the seventh interrogatory they say: That the said Samuel Jaudon did pledge or hypothecate with these defendants a certificate for certain shares of said Delaware & Raritan Canal Company stock, to wit, forty-seven shares, and that said shares were so hypothecated on the twenty-first day of October, 1866.

To the eighth interrogatory they say that: The said certificate purported to have been issued to said Samuel Jaudon, in his name, as trustee.

To the ninth interrogatory they say: That the said Samuel Jaudon pledged and hypothecated said certificates to the said bank as security for the repayment to said bank of moneys loaned or furnished by them to the said Samuel Jaudon.

To the tenth interrogatory they say: That the said moneys were loaned or furnished about the 21st day of October, 1866; that the whole amount so loaned to said Samuel Jaudon, was the sum of $9,500; that the same was loaned in one sum on said last-mentioned day; that the same was loaned to said Samuel Jaudon, and that such loan was made

upon the account of the said certificate of said stock and other
59 valuable considerations, which was, at the time and place of making such loan and as consideration thereof, delivered to these defendants.

To the eleventh interrogatory they say: That the said certificate did show upon its face that the said shares of stock were held by said Samuel Jaudon in trust, and that upon their face they did not show who was the person for whom they were held on trust, and that these defendants were not informed and did not know for whom the said shares were held by said Samuel Jaudon.

To the twelfth interrogatory they say: That the bank did cause to be sold the said shares of stock; that the same were sold by or through the firm of Drexel, Winthrop & Co., stock brokers, in the city of New York, as these defendants believe; that they never knew and are not able to state to whom they were then sold or disposed of, and are unable to state for how much the same were sold; that the proceeds were applied to the repayment of said loan and interest.

Fourteenth. These defendants, save and except as hereinbefore stated to the contrary, have no knowledge or information in the premises whatever, and they allege and insist that they are bona-fide purchasers of said stock for a good and valuable consideration, without any notice or knowledge of the rights of the plaintiff therein, and without
60 any notice of any actual or intended breach of trust on the part of said trustee, and without any other notice of the existence of any trust whatsoever, except so far only as notice may be imputed to them by law upon the facts hereinbefore stated.

Fifteenth. And these defendants pray that they may have the same benefit and advantage in the premises as they should be entitled to have if the facts alleged in their answer had been pleaded in bar to the plaintiff's bill.

Sixteenth. These defendants deny all and all manner of unlawful combination and conspiracy wherewith they are by the said bill charged, without this, that there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein or hereby well and sufficiently answered, confessed, traversed, avoided, or denied, is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready to aver, maintain, and prove, as the honorable court shall direct; and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

B. CARTWRIGHT, *Cr.*

MERRIHEW & ARNOUX,
Sol'rs for Def'ts.
CHA'S W. WRIGHT,
Of Counsel.

61 CITY & COUNTY OF NEW YORK, *ss:*

Benjamin Cartwright, being duly sworn, says that he is the cashier of the above-named defendants, The National City Bank; that he has read the foregoing answer and knows the contents thereof, and that the same is true, to his own knowledge, except as to any matters stated on information and belief, and as to those matters he believes it to be true.

B. CARTWRIGHT, *Cr.*

Sworn to before me this day of June, 1870.

WM F. McRAE,
Notary Public New York County.

(Endorsed:) U. S. circuit court southern district of New York. Mary T. B. Jaudon ag'st The National City Bank, impl'd. Answer. Merrihew & Arnoux, def'ts' solicitors. Flled June 6, 1870.

62

63 Circuit court of the United States, second circuit, southern district of New York. In equity.

MARY T. B. JAUDON
against
THE NATIONAL CITY BANK, IMPLEADED WITH Samuel Jaudon & o'rs.

The replication of Mary T. B. Jaudon, complainant, to the answer of the National City Bank, defendant.

This repliant, saving and reserving to herself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiences of the said answer, for replication thereto, says that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in law to be answered unto; and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which matters and things this repliant is and will be ready to aver, maintain, and prove as
64 this honorable court shall direct. And humbly pray as in and by her said bill she has already prayed.

STRONG & SHEPARD,
Sol'rs for Complainant.

(Endorsed:) U. S. circuit court, southern district. Mary T. B. Jaudon ag't The National City Bank, (impleaded.) Replication. Strong & Shepard, sol'rs for complainant, 90 Broadway, N. Y. Filed July 2, 1870.

65 Circuit court of the United States, second circuit, southern district of New York. In equity.

MARY T. B. JAUDON
against
WILLIAM B. DUNCAN, DAVID DUNCAN, AND William Watts Sherman, impleaded with Samuel Jaudon & others.

The replication of Mary T. B. Jaudon, complainant, to the answer of the defendants William B. Duncan, David Duncan, and William Watts Sherman.

This repliant, saving and reserving to herself now and at all times hereafter all and all manner of benefit and advantage of exception

which may be had or taken to the manifold insufficiences of the said answer, for replication thereunto, says that she will aver, maintain, and prove her bill of complaint to be true, certain, and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true. All which mat-
66 ters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct. And humbly prays as in and by her said bill she has already prayed.

STRONG & SHEPARD,
Sol'rs for Complainant.

(Endorsed:) U. S. circuit court. Mary T. B. Jaudon ag't William B. Duncan et al., impleaded. Replication. Strong & Shepard, sol'rs for complainant, 90 Broadway, N. Y. Filed July 2, 1870.

67 U. S. circuit court, southern district of New York. In equity.

MARY T. B. JAUDON
ag't
THE NATIONAL CITY BANK, WILLIAM B. DUNCAN, David Duncan, & William W. Sherman, impleaded with Samuel Jaudon and others.

It is hereby stipulated that the examination of witnesses in this action in behalf of either party, may take place and be had before a United States commissioner, or an examiner for taking testimony in a circuit court of the United States, or a notary public to be procured by the party taking such testimony, such examination to commence at the office of complainant's solicitors, No. 90 Broadway, New York, August 2d, 1870, at 11 a. m., and to continue at such times and places as may be mutually agreed upon, or as the officer for taking such testimony may direct within the city of New York; the said defendants to be in attendance to testify at said time and place.

That the testimony so taken of witnesses who may be examined under this stipulation, when reduced to writing, signed by the
68 witness, and certified by the officer, may be read upon the trial of this action by either party with the like force and effect as though such witnesses appeared before, and such testimony was taken by, an examiner, pursuant to the rules and practice of the court. All objections to questions put, and the testimony, to be noted by the officer, and to be decided upon the trial.

Such testimony, when taken, reduced to writing, and certified as aforesaid, to be delivered or forwarded by the officer to the solicitor for the party taking the same, or his agent, to be sent to be put on file with the clerk of the court at the city of New York, within ten days there after.

Dated New York, July 19th, 1870.

MERR'HEW & ARNOUX,
Att'y for City B'k.
BOWDOIN, LAROCQUE & BARLOW,
Att'ys for Duncan & als.
STRONG & SHEPARD,
Solicitors for Compl'ts.

69 On filing the foregoing stipulation, an order, by consent, to the effect thereof may be made and entered in the office of the clerk of this court, in the city of New York.

Dated New York, July 19th, 1870.

MERRIHEW & ARNOUX,
Att'ys for City Bank.
BOWDOIN, LAROCQUE & BARLOW,
Att'ys for Duncan et al.
STRONG & SHEPARD,
Solicitors for Complainant.

(Endorsed:) U. S. circuit court. Mary T. B. Jaudon ag'st William B. Duncan et als. Stipulation. Filed July 20, '75.

70 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-house, in the city of New York, on the 19th day of July, in the year 1870—

Present, Hon. Samuel Blatchford, judge.

MARY T. B. JAUDON
vs.
WILLIAM B. DUNCAN & OTHERS.

On reading and filing the consent, in writing, of the solicitor of the defendants who have answered, and of the solicitors of the complainants in this action, dated the 19th day of July, in the year 1870, and, on motion of Strong & Shepard, solicitors of the complainants, it is ordered that the examination of witnesses in this action, in behalf of either party, may take place and be had before a United States commissioner, or an examiner for taking testimony in a circuit court of the United States, as a notary public, to be produced by the party taking such testimony, such examination to commence at the office of complainant's solicitors, No. 90 Broadway, New York, August 2, 1870, at 11 a. m., and to continue at such times and places as may be
71 mutually agreed upon, or as the officer for taking such testimony may direct, within the city of New York; the defendants to be in attendance to testify at such time and place.

That the testimony so taken of witnesses who may be examined under the 4th consent, when reduced to writing, signed by the witnesses, and certified by the officers, may be read upon the trial of this action by either party, with the like force and effect, as though such witnesses appeared before, and such testimony was taken by, an examiner, pursuant to the rules and practice of the court. All objections to questions put, and *and* the testimony, to be noted by the officer, and to be *observed* upon the trial.

Such testimony, when taken, reduced to writing, and certified as aforesaid, to be delivered or forwarded by the officer to the solicitor of the party taking the same, or his agent, to be sent to such solicitor, and the same to be put on file with the clerk of the court, at the city of New York, within ten days thereafter.

SAM'L BLATCHFORD.

72 (Endorsed:) U. S. circuit court, so. dist. of New York. Mary T. B. Jaudon vs. Samuel Jaudon et al. Order. Strong & Shepard, sol'rs for compl'ts, 90 Broadway, N. Y. Filed July 20, '70.

73 United States circuit court, southern district of New York.

MARY J. B. JAUDON, BY HER NEXT FRIEND,
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon.

Depositions and testimony taken on behalf of the plaintiff, before a notary public, in the city of New York, by consent of the parties, by a stipulation of the respective solicitors duly filed with the clerk of this court, and an order of the court, duly entered thereupon on the 20th day of July, 1870.

Appearances.

For complainant, appeared Messrs. Strong and Shepard.
For defendant, appeared Messrs. Bowdoin, Larocque & Barlow, and Merryhew and Arnoux.
NEW YORK, *Tuesday, Aug.* 2, 1870.

74

75 United States circuit court, southern district of New York.

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against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon.

Depositions and testimony taken on behalf of the plaintiff, before a notary public, in the city of New York, by consent of parties, by a stipulation of the respective solicitors duly filed with the clerk of this court, and an order of the court, duly entered thereupon on the 20th day of July, 1870.

CITY AND COUNTY AND STATE OF NEW YORK, *ss:*

BENJAMIN CARTRIGHT, being duly sworn for the complainants, testified as follows:

Examined by Mr. Strong:

I am the cashier of the National City Bank, of the city of New York.

76 1. Q. How long have you been such cashier?
A. I think it is going on 13 years.

2. Q. Is that bank located in, and a resident of, this city, and a citizen of the State of New York?

Mr. ARNOUX. I believe we have admitted that.

Mr. STRONG. I believe you have.

3. Q. (continued.) Created and organized under an act of Congress?
A. Yes, sir.

4. Q. Do you know Mr. Samuel Jaudon, one of the defendants?
A. Very well, sir.

5. Q. Did you verify the answer of the bank in this action?
A. I believe I did; yes, sir.

6. Q. Did you personally superintend, on the part of the bank, the transactions with Mr. Jaudon, which are referred to in the answer?

A. In reference to the loan?

7. Q. Yes, sir.

A. I made the loan to him; yes, sir, as cashier.

8. Q. When did that transaction take place?

A. I think the date is there, taken from our books, 21st Oct'r, 1866.

77 9. Q. Did you at that time receive from Mr. Jaudon the 47 shares of Delaware & Raritan Canal Co's stock referred to in the answer?

A. I cannot remember what number of shares there were, because I have nothing to help my memory. We kept our books different at that time from what we do now. I only know it was Delaware & Raritan Canal stock.

10. Q. All the stock the bank received from Jaudon was received at that time?

A. Yes, sir.

11. Q. State the circumstances of the loan?

A. I don't know of any circumstances to state except that Mr. Jaudon desired a loan upon these securities and I made it to him.

12. Q. What was the amount of that loan?

A. $9,500.

13. Q. What arrangement at that time was made in regard to the proceeds of the loan?

A. I gave Mr. Jaudon my cashier's check; I don't know what disposition he made of it.

14. Q. What was the amount of the proceeds?

A. That was the nett of it—$9,500.

15. Q. And deducted simply the ordinary discount?

A. No discount; he paid the interest when the loan was made.

78 16. Q There was no discount, then, made at the time?

A. Not at the time; no, sir.

17. Q. Did Mr. Jaudon give his note for the amount of the loan?

A. No, sir; I simply took the securities.

18. Q. Have you examined the books, to see whether any paper was taken from Jaudon besides the certificate of stock?

A. Well, the books in the bank would not tell anything about it. That is our habit. It is rare for us to take a note, except we discount it; where we make loans we simply take securities.

19. Q. Do you speak from personal recollection of that particular transaction or from your practice?

A. I speak from our general course of business. I am certain there was no note. I don't think he gave any note.

20. Q. Does that certainty rest on the present recollection of your habit of business?

A. Yes, on recollection; that is not a thing we generally exact, where a loan is made on call. I don't think we exacted it from him in that case.

21. Q. Would the books of the bank show whether a note was taken?

79 A. No, sir; not without we discounted the paper; when it went through the discount book.

22. Q. What entry or entries of the transaction was made upon the books?

A. Simply charged to Notes receivable, the loan to S. Jaudon, and the amount.

23. Q. Can you refer to those entries on the books?

A. Here is the memoranda, made from those entries, simply charged to Notes receivable; Mr. Jaudon having no account with us I must have given him a cashier's check, which, I think, he disposed of somewhere, and substituted that charge for it next morning.

24. Q. Do you recollect how it was done?

A. I think that was the way it was done.

25. Q. Will you furnish a transcript of all the entries to the transaction, to be annexed to your deposition?

A. I will.

26. Q. Was this the first transaction of the like had with Mr. Jaudon?

A. Oh, no; I had lent Mr. Jaudon many times before.

27. Q. Did this loan, of which you have spoken, have any connection with the previous loans you had made to him?

A. I guess they were all of the same character.

80 28. Q. Did Mr. Jaudon, at any time, previous to this loan, to which you have particularly referred, become responsible for an indebtedness of his sons to your bank?

A. No, sir; not to the bank; I have no recollection of his ever doing anything of the kind.

29. Q. Did his sons have business transactions with the bank?

A. Oh, I had made his sons' firm loans at different times.

30. Q. What was the name of their firm?

A. Peyton & Frank Jaudon.

31. Q. You have no recollection then of Mr. Jaudon assuming the liability of his sons to your bank?

A. No, sir.

32. Q. Was that loan, to which you have particularly referred, a renewal of previous loans?

A. Well, he paid it off at two or three different times, when I called upon him.

33. Q. Paid it off—that was by borrowing again?

A. No; he borrowed somewheres else in the meantime.

34. Q. The account on your books will show how the fact is, will it not?

A. About previous loans?

35. Q. Yes.

81 A. Oh, yes.

36. Q. Can you state whether upon this particular loan of Oct. 21st, 1866, any money was advanced by the bank to Mr. Jaudon?

A. The whole face of the loan was advanced to him.

37. Q. In money?

A. I think in my check, the same thing as money; in my cashier's check.

38. Q. Was that paid in money?

A. It must have come to us through the exchanges with the other banks, or he may have gone to the counter.

39. Q. I want your recollection?

A. I don't recollect anything about that; I can't say; I can't say whether he drew the money at the counter, or it came through exchanges; but that is my impression.

40. Q. Can you say whether this loan, as you call it, of which you have spoken, was made to pay a previous loan of like character from your bank.

A. It was not made to pay any previous loan, that was, if that had been paid.

41. Q. Explain ; I don't understand ?

A For instance: Jaudon had a loan of $9,500 with us, and we called upon him to pay it, and he comes and pays it—that transaction is
82 settled. If he comes again, in two or three weeks, and wants a loan again—that is a new transaction.

42. Q. He could pay it, I suppose, by procuring a new loan and applying the proceeds on that loan ?

A. What we call the renewal of a loan is where a party comes and pays up his interest and renews the loan that still remains in bank.

43. Q. Do you know how it was in this case ?

A. I do not.

44. Q. The books will show, will they not ?

A. That is my impression ; yes ; the books will show ; my impression is the loan had been paid off some time previously ; I am pretty confident of that.

45. Q. The books will show ?

A. Yes, sir.

46. Q. With a certainty how the fact was ?

A. Yes, sir.

47. Q. Is the account a long one or a short one ?

A. Well, as I say, Mr. Jaudon had no account with us.

48. Q. Well, these entries ?

A. These entries, they are simple, simply a charge and a credit when paid.

49. Q. And is this account together or is it scattered ?

A. O, scattered—at different times.

83 50. Q. Well, it is brought together in the ledger, is it not ?

A. What account have you reference to ?

51. Q. These entries with reference to the transaction.

A. That goes on through notes receivable, whenever a loan was made, and that was a long account.

52. Q. Are they brough together in the ledger ?

A. The dates can be picked out ; we do not keep a seperate loan account with each individual we make loans to.

53. Q. You have no memorandum with you of the form of the accounts ?

A. No.

54. Q. Nothing but the dates ?

A. No ; we have what is called a loan account, that is, notes receivable ; loans made are charged to that account, and when they are paid they are credited to that account.

55. Q. Will you state the different entries upon the books of the bank relating to this transaction with Jaudon, so that I may see precisely what accounts you *you* kept.

A. The same charge—Notes receivable: Loaned Mr. S. Jaudon—and the amount ; when a loan is paid, the credit and the date when a loan is paid, the credit under the date of it, and then a credit to the interest account for the interest received.

84 56. Q. Now have you stated all the entries ?

A. Yes, sir.

57. Q. How would you ascertain from the books as to how these proceeds were advanced or applied—the proceeds of the different transactions ?

A. How can we tell from the books of the bank ?

58. Q. Yes.

A. We cannot tell from the books of the bank how the proceeds were

applied. I only know I must have given Mr. Jaudon something for the loan, and he, not keeping an account with us, I must have given him my cashier check.

59. Q. I want to know how you can tell from the books whether one transaction was to satisfy a claim arising out of a previous transaction.

A. We called it a payment, because time elapses between the two transactions.

60. Q. Now, how can you tell whether any one of these series of transactions was the mode of paying a prior indebtedness, or whether currency was advanced, or a check given—how can you tell by the books?

A. Whether I gave Mr. Jaudon a check for the loan?

85 61. Q. Or gave him currency, or applied the amount of it to pay a previous demand?

A. Didn't apply the amount to pay a previous one, because he found the money somewhere else; and with regard to the mode of payment, my inference is, I gave him a cashier's check, and I think I can find the entries of it.

By Mr. Arnoux:

62. Q. Don't the state of your cashier's check-book tell that?

A. No; had no cashier's check-book; just loose checks.

By Mr. Strong:

63. Q. Do the books show how it was done in each case?

A. They won't tell, because I might have given Mr. Jaudon my cashier's check payable to his order, and he may have gone to the counter and paid the money.

64. Q. He may have gone to the counter and paid the previous one?

A. Oh, no; he didn't do that; I am pretty certain he paid me a check on the Phœnix Bank.

65. Q. Paid a previous one?

A. Yes, sir.

66. Q. Will your books show how it was?

A. No; they will show the payment, but not how it was done.

67. Q. Do you mean to say that your books will not show pre-

86 cisely how each loan was paid?

A. No; I don't think they will.

68. Q. Is it not possible to ascertain from the books how it was done?

A. No; it is not possible, because you can't keep an entry of what every loan is paid with; that would be an impossibility.

69. Q. You don't pretend that you have a perfect recollection as to how each of these transactions was done, do you?

A. No; I only know— yes; as far as the bank is concerned, I know, as I tell you, that the loan was paid off; that my impression is, Jaudon gave me a check on the Phœnix Bank; he kept an account there, I know, upon previous occasions, and had done so; at least, that is the impression I am under now.

70. Q. Do you say so from the general course of business in the bank, or from recollecting at the time how it was?

A. That is my recollection; that is my impression—that he paid me in that way.

71. Q. When was this stock first given to your bank?

(Defe't's counsel objects that they cannot enter into an investigation prior to the time alleged in the complaint.)

87 A. That I don't know, sir.

72. Q. Can you say whether it was at this date you have mentioned—the 21st of October, 1866, or a prior time?

A. I had this stock prior to this, for other loans.

(Under the same objection.)

73. Q. Was it in your bank at that time, and had it been so for a considerable time?

(All this under objection.)

A. He had been there, as I say, several times.

74. Q. Had it remained there?

A. No; been taken out at different times and removed somewhere else.

75. Q. By Jaudon?

A. Mr. Jaudon paid it, certainly; when I called upon him to pay a loan he generally paid it.

76. Q. Was this stock in one certificate, or more than one?

A. More than one, I think; I can't remember how many.

77. Q. Do you recollect the form of that certificate?

A. I do not.

78. Q. Do you recollect in whose name the stock stood as shown in these certificates?

A. That I can't remember; I have so many of these things, I can't investigate all.

88 79. Q. Did the certificates show upon their face that Mr. Jaudon was trustee?

A. I think it did; yes, sir.

80. Q. Did they or it show for whom he was trustee?

A. That I don't recollect sir.

81. Q. You are not able to say?

A. Whether it was in his own name, as trustee, or whether the name was mentioned as the party for whom he was trustee?

82. Q. That you don't recollect?

A. That I don't recollect.

83. Q. Did Mr. Jaudon say anything in the course of these loans as to the purpose for which he wanted the funds?

A. Not to me sir; no.

84. Q. Was the application for each of these loans made to you personally, or some other officer of the bank?

A. Personally; by Mr. Jaudon to me.

85. Q. Did any other officer of the bank have anything to do with those transactions?

A. Not the slightest; no, sir.

86. Q. When was the last transaction you had with Mr. Jaudon of this character?

A. I think there at the time he paid it off.

87. Q. When was that?

WITNESS. Was not that date in January, 1867?

89 Mr. ARNOUX. Yes; that is the date we have.

88. Q. When was the claim of the bank upon the last loan which you made to Mr. Jaudon satisfied?

A. I think I called upon Mr. Jaudon to pay the loan, and he gave me a verbal order to sell the stock; and I told him I guess I had better sell it through Drexel, Winthrop & Co. They had a Philadelphia house.

89. Q. Did you have it sold?

A. Yes, sir.

90. Q. For what amount?

A. That memorandum will tell.

91. Q. Is that the memorandum that was furnished?
A. Is this the one I gave you, Mr. Jaudon?
Mr. JAUDON. I presume it is.
A. Then this came from Drexel, Winthrop & Co. to me, and I gave it to Jaudon.
92. Q. This is the statement furnished you by Drexel, Winthrop & Co.?
A. I guess their books will corroborate that.
Marked "Exhibit No. 1, Aug. 2, 1870. A. E. C.," being paper as follows:

"NEW YORK, *Dec.* 10, 1867.

"Drexel, Winthrop & Co., sold for account of B. Cartwright, esq.

	"DEC'R 5. 47 Camden and Amboy, *a* 125¾....		$5,910 25
90	"Less com	11 75	
	"Tax	60	
			12 35
			$5,897 90"

93. Q. Were the proceeds of the sale applied to ——
A. To the liquidation of the loan? Yes, sir.
94. Q. Do you know whether there was any balance?
A. Balance coming to him?
95. Q. Yes.
A. I really forget what the balance of the loan was paid in.
96. Q. Did the bank hold any other securities in respect to this loan?
A. It must have held some others, because that didn't cover it.
97. Q. Will the books show?
A. No, sir.
98. Q. Have you any recollection of the fact?
A. I have not; at that time generally *con*tained a memorandum of securities. We generally had them on the book. I know there must have been something else.
99. Q. Can you ascertain from your books?
A. No, sir.
100. Q. No mode by the books of ascertaining anything on the subject?
A. No, sir.
Examination adjourned to Thursday, Aug. 1, at 11 a. m.

91 NEW YORK, *Thursday, Aug.* 4, 1870—11 *a. m.*

The direct examination of Benjamin Cartright, resumed as follows:

By Mr. STRONG:

101. Q. Have you examined the books of the bank for the entries of the transactions with the defendant Samuel Jaudon, in reference to the loans of your bank to him?
A. Yes, sir.
102. Q. Have you caused a statement to be prepared, giving a transcript of those entries for the purposes of this examination?
A. I have.
103. Q. Please make a statement of those entries, as shown by the

book, and explain what those entries indicate where it is not apparent upon the face of the entries.

A. The accounts of loans of this character are kept in the bank in a book which is entitled "Debit cash general ledger, National City Bank of New York." The payments of such loans, and of the interest on them, are kept in another book entitled "Note book, National City Bank of New York." The principal sum of the loans is entered
92 in both of those books, under the title of "Notes receivable." The entries paid are entered in the note book, under the title of "Interest account." In the debit cash book, I find the following entries: "Monday, October 16, 1865, notes receivable, loaned to S. Jaudon, 6", with a dash following, indicating "six thousand dollars;" "Monday, November 27, 1865, notes receivable, loaned to S. Jaudon, 3,500;" "Friday, January 19, 1866, notes receivable, loaned to S. Jaudon, 9,500;" "Wednesday, April, 18, 1866, notes receivable, loaned to S. Jaudon, 9,500;" "Thursday, July 19, 1866, notes receivable, loaned to S. Jaudon, 9,500;" "Saturday, October 13, '66, notes receivable, loaned to S. Jaudon, 9,500;" Saturday, January 19th, 1867, notes receivable, S. Jaudon, 9,500;" "Saturday, April 13, 1867, notes receivable, loaned to S. Jaudon, 9,500;" Saturday, July 16, 1867, notes receivable, loaned to S. Jaudon, 9,500;" "Saturday, October 12th, 1867, notes receivable, loaned to S. Jaudon, 9,500;" and these constitute all the entries contained in that debit cash book, relating to this subject. In the note book, the following entries: "Saturday, December 30, 1865, interest account, S. Jaudon, 224 19;" "Wednesday, January 17, 1866, notes receivable, S. Jaudon, j'r, 9,500, interest account, S. Jaudon, j'r, 31 40;" "Wed-
93 nesday, April 11, 1866, notes receivable, S. Jaudon, j'r, 151 47;" "Monday, July 16, 1866, notes receivable, S. Jaudon, j'r, 9,500, interest acccount;" "do" under S. Jaudon, "166 25;" "Wednesday, October 10, 1866, notes receivable, S. Jaudon, 9,500, interest account," with ditto marks under name 'S. Jaudon,' "158 86;" "Monday, January 14, 1867, notes receivable, S. Jaudon, 9,500, interest account, S. Jaudon, 169 94;" "Wednesday, April 10, 1867, notes receivable, S. Jaudon, 9,500, interest account, S. Jaudon, 151 47;" "Saturday, June 29, 1867, notes receivable, S. Jaudon, 9,500, interest account, S. Jaudon, 144 08;" "Thursday, October 10, 1867, notes receivable, S. Jaudon, 9,500, interest account, ditto, 190 58;" "Wednesday, December 11, 1867, notes receivable, S. Jaudon, 5,897 90;" "Wednesday, January 15, '68, notes receivable, S. Jaudon, 3,602 10, interest account; 141 60," and these are all the entries I find on this book relating to this matter. The dates in these two books are at the head of the page, or the beginning of the day's transactions, the titles "notes receivable" and "interest account," are in the first column, and the name in the second column, entered on the page."

104. Q. When were the 47 shares of Delaware and Raritan
94 Canal Company's stock first given to the bank as security for a loan?

A. I cannot say; I presume it was in that first loan of six thousand dollars.

105. Q. Do not the books show?

A. The books don't show; those entries—the debit and credit entries show the entire transactions.

106. Q. You are unable to recollect when it first took place?

A. That is my recollection.

107. Q. Were any other securities, or was any other security received for this six-thousand-dollar loan, to which you have last referred?

A. I cannot remember, sir.

108. Q. How long did the 47 shares of the Delaware and Raritan Canal Company's stock remain in the bank?

A. My impression was that it was in all those loans.

109. Q. Have you any recollection whether or not it was taken out of the bank at any time in the progress of those loans?

A. When the loans were taken up, these credits were given to Mr. Jaudon.

110. Q. Do you mean the final payment?

A. I mean every time he took up a loan the credits were given back to him.

95 111. Q. Was any other security—collateral security—furnished to the bank upon any of these loans, than those 47 shares of Delaware and Raritan Canal Company's stock?

(Objected to as inquiring into matters disconnected with the action.)

A. When the loan was increased to $9,500 there must have been other securities added, because that stock would not have been sufficient to cover the amount.

112. Q. Have you any recollection of the fact that other security was furnished; if so, what the security was?

(Objected as before.)

A. I have recollection of the fact that there was other security besides that, but what it was I cannot say.

113. Q. Was that other security also taken up upon each occasion of paying the loans?

A. Yes; the entire securities were given up with the loans, whatever they were.

114. Q. Do you recollect the conversation between you and Mr. Jaudon in respect to the terms upon which you received these securities?

A. I have no recollection of any particular conversation with him, anything more than his requesting a loan, and I giving it to him.

96 115. Q. Did you exact collaterals, or did he propose to furnish them?

A. He proposed to furnish collateral, of course; we are not in the habit of loaning money without we get collaterals.

116. Q. And these securities were furnished in pursuance of his proposition, and you assenting to it?

A. Yes, sir.

117. Q. Was anything said in reference to a sale of these securities in case of a default to pay the loan?

A. I don't remember anything being said at that time.

118. Q. Do you recollect whether the securities to which you have referred were the same in reference to all the loans?

A. My impression is that they were all the same securities.

119. Q. There was no change in the securities, then?

A. I don't think there was.

120. Q. On each loan there were the same collaterals that had been furnished on the previous loan?

A. I think they were the same.

121. Q. I think you have stated that you have no recollection that anything was said between you and Mr. Jaudon on the occasion

97 of any of these loans in reference to the purpose for which he wanted the moneys or to which they were to be applied.

A. I have no recollection of any conversation that may have taken place.

122. Q. I notice in the answers of the bank, verified by you, that there

was a loan to Mr. Jaudon by the bank on the 21st of October, 1866—the sum of $9,500—and that such loan was made on account of the certificate of said stock and other valuable considerations. Does this statement in the answer "and other valuable considerations" refer only to the other securities?

A. Other collaterals?

123. Q. Yes, the other collaterals.

A. That is all, sir.

Cross-examination by Mr. Arnoux:

124. Q. Was it not the custom in the bank, at the time of the making of these different loans, instead of entering any memorandum upon the books in reference to the securities, to put the securities in separate envelopes and endorsed on the envelope the name of the party to whom the loan was made, and the amount of the loan, and the nature of the securities?

(Objected to by complainant's counsel that "custom" is not competent evidence.)

98 A. That was the invariable rule, or was at that time. I was cashier, loan-clerk, and general book-keeper, and did two-thirds of the work of the bank, and I hadn't time to make detailed entries on the books, and they were entered on the envelopes.

125. Q. Was not that done in reference to the securities of Mr. Jaudon?

A. Well, if was not done it ought to have been.

126. Q. Well, it was done?

A. Yes; I think the envelope probably contained a memorandum of what the securities were.

127. Q. Reading the entries of the debit-cash, general ledger, and the note-book together, is this the state of the account: That the two loans of $6,000 and $3,500 were paid off on the 17th of January, 1866, with the balance of the interest then due?

(Complainant's counsel objects that *that* the entries show all that they prove, and that an explanation is not competent.)

A. I judge from the entry there that that was a consolidation of the two loans.

128. Q. I want to know whether that was not the first payment?

A. That was the first payment, and that was with interest.

99 129. Q. Then, until the 19th of January, there was no loan owing by Samuel Jaudon, on account of this matter, to the bank?

A. There was not; he had paid it.

130. Q. How long a time elapsed after the payment of the loan that had been made on the 19th of January, 1866, before a new loan was made?

A. These dates show when the notes were paid. Wednesday, the 11th, it was paid, and April 18th there was a new loan made of $9,500.

131. Q. Were any of these loans, after the 30th of December, 1865, renewals of former loans, or were they new and independent loans?

A. New and independent loans; they speak for themselves; different dates; they were all settled and interest paid.

132. Q. Was not the cash or its equivalent paid to Mr. Jaudon on making these separate and independent loans?

A. Mr. Jaudon must have got either the money or my cashier's check.

133. Q. Which was equivalent to money?

A. Yes, undoubtedly.

134. Q. And the consideration for the payment of that money was the

hypothecation of the securities that were placed in the hands of the bank, was it not?

A. That was it.

135. Q. Are you now certain that you had no conversation with
100 Mr. Jaudon about the application of the money that he received from the bank at these different loans?

A. I am pretty confident about it; but I don't know what conversation I should have had with Mr. Jaudon.

136. Q. What was Mr. Jaudon's business; had he been a business man?

A. Mr. Jaudon had been a business man; I don't know whether he was at that time or not.

137. Q. Was it not the custom to sell collaterals on default of payment when it was a call loan, and the loan was called in?

(Objected to by complainant's counsel that custom is not admissible.)

A. That is customary with us when we have call loans, and they are not responded to when demanded, to sell the securities.

(Answer objected to.)

138. Q. Before selling these collaterals, was not a demand made on Mr. Jaudon to pay the loan?

A. I don't remember whether I made a demand to Mr. Jaudon to pay the loan or not, or whether he voluntarily—I think it is more than probable I called upon him to pay the loan.

139. Q. Do you remember anything being said about selling these securities by Mr. Jaudon?

101 A. He gave me verbal instructions to have those securities sold.

140. Q. And that was the sale that was made, to which you have already testified; made in pursuance of the verbal instructions you received from Mr. Jaudon?

A. It was.

141. Q. In respect to the difference in the dates in the answer of the bank, which you have verified, and the testimony, you wish to be understood as correcting the dates in the answer to conform to the evidence you have given?

A. With the books?

142. Q. The evidence you have given.

A. Yes, sir.

Re-direct examination by Mr. Strong:

143. Q. When, if at all, were those instructions of Mr. Jaudon, for a sale of these collaterals, given to you?

A. It must have been given to me just before the date of the sale of Drexel, Winthrop & Company; probably within a few days of that.

144. Q. Was it after he had been called upon to pay the loan?

A. That I won't be certain—whether I had called upon him to pay it, or whether it was voluntary on his part.

102 145. Q. Was it after default in making payment?

A. That I don't know.

146. Q. The sale was not until after default, was it?

A. The sale might have been, according to his instructions; he might have said "Mr. Cartwright, I want to pay that."

147. Q. Do you recollect how it was?

A. My impression is, I must have called upon him to pay up the loan, and then he told me to sell the stock.

148. Q. Did he express inability to pay it?

A. That I don't remember.

149. Q. In reference to the details of these transactions, do you not have to depend, in giving your testimony, upon the entries which are made in the books?

A. Yes; and the entries in the books is what I rely upon.

A copy of the entries from the books, as testified to by the witness, is hereunto annexed.

103 U. S. circuit court.

MARY T. B. JAUDON
ag'st
THE NAT. CITY BANK, IMPL'D &C.

Debit-cash, general ledger, National City Bank of New .

Monday, Oct. 16th, 1865.
Notes receivable, loan to S. Jaudon..... 6——

Monday, November 27th, 1865.
Notes receivable, loan to S. Jaudon..... 3,500

Friday, Jan'y 19th, 1866.
Notes receivable, loan to S. Jaudon..... 9,500

Wednesday, April 18th, 1866.
Notes receivable, loan to S. Jaudon..... 9,500

Thursday, July 19th, 1866.
Notes receivable, loan to S. Jaudon..... 9,500

Saturday, October 13, '66.
Notes receivable, loan to S. Jaudon..... 9,500

Saturday, Jan'y 19th, 1867.
Notes receivable, S. Jaudon..... 9,500

Saturday, April 13th, 1867.
104 Notes receivable, loan to S. Jaudon..... 9,500

Saturday, July 6th, 1867.
Notes receivable, loan to S. Jaudon..... 9,500

Saturday, Oct. 12th, 1867.
Notes receivable, loan to S. Jaudon..... 9,500

Note-book, National City Bank of New York.

Saturday, Dec. 30, 1865.
Interest ac., S. Jaudon..... 224 19

Wednesday, Jan'y 17, 1866.
Notes receivable, S. Jaudon, tr..... 9,500
Interest ac., S. Jaudon, tr..... 31 40

Wednesday, April 11, 1866.
Notes receivable, S. Jaudon, tr..... 9,500
Interest ac., S. Jaudon, tr..... 151 47

Monday, July 16th, 1866.

Notes receivable, S. Jaudon	9,500	
Interest ac., "	166	25

Wednesday, Oct. 10, 1866.

Notes receivable, S. Jaudon	9,500	
Interest ac	158	86

Monday, Jan'y 14th, 1867.

Notes receivable, S. Jaudon	9,500	
Interest ac., S. Jaudon	169	94

105 Wednesday, April 10, 1867.

Notes receivable, S. Jaudon	9,500	
Interest ac., S. Jaudon	151	47

Saturday, June 29th, 1867.

Notes receivable, S. Jaudon	9,500	
Interest ac., "	144	08

Thursday, Oct. 10, 1867.

Notes receivable, S. Jaudon	9,500	
Interest ac., "	190	58

Wednesday, December 11th, 1867.

Notes receivable, S. Jaudon	5,897	90

Wednesday, Jan'y 15, '68.

Notes receivable, S. Jaudon	3,602	10
Interest ac.	141	60

B. CARTWRIGHT.

Subscribed and sworn to before me this 9th day of August, 1870.

THERON GEO. STRONG,
Notary Public N. Y. County.

106 CITY AND COUNTY AND STATE OF NEW YORK, *ss:*

AUGUST 2D, 1870.

FRANCIS S. CONOVER, being duly sworn, says:

Direct examination by Mr. Strong:

1. Q. Where do you reside?
A. Princeton, New Jersey.
2. Q. Have you had connection with the Delaware and Raritan Canal Company for several years?
A. Yes, sir.
3. Q. State what.
A. I have been the register and transfer agent.
4. Q. For what length of time?
A. Since 1865.
5. Q. Is there any connection between that company and the Camden and Amboy Railroad Company?
A. They are joint companies; the stock is kept seperate.
6. Q. The Camden and Amboy stock is by itself?
A. And the Delaware and Raritan Canal stock by itself.
7. Q. You have charge of the books relating to the stock?
A. Yes, sir.

8. Q. Have you certificates of stock of the Delaware and Raritan Canal Company, issued to Samuel Jaudon, the defendant?

A. Yes, sir.

107 9. Q. Will you produce them?

(Papers produced.)

The following are copies:

Joint-stock of the Delaware & Raritan Canal Company and Camden and Amboy Railroad and Transportation Company.

[VIGNETTE.] [VIGNETTE.]

No. 2665.] [VIGNETTE.] [Shares, 70.

STATE OF NEW JERSEY.

OFFICE OF THE CANAL COMPANY.

$100 each share.

This is to certify that S. Jaudon, trustee for Mrs. Mary T. B. Jaudon, is entitled to seventy shares in the capital stock of the Delaware & Raritan Canal Company, subject to an agreement entered into between the Delaware & Raritan Canal and Camden & Amboy Railroad and Transportation Companies, of the one part, and the Philadelphia and Trenton Railroad Company, of the other part, dated April 22d, 1836, providing, among other things, that, from and after the first day of June, then next ensuing, the clear profit arising from the stock of the said companies should be divided among all the stockholders of the said several companies, share and share alike. Transferable on the books of the company, and on surrender of this cer-

108 tificate, only by him or his legal representative.

[Capital stock, three millions.] [VIGNETTE.]

Witness our hands and the seal of the company, at Princeton, N. J. this thirteenth day of December, 1851.

[SEAL.] R. F. STOCKTON,
President.

RICHARD STOCKTON,
Treasurer.

Annexed to the foregoing by a pin is the following:

Transfer of stock. Irrevocable.

Know all men by these presents that I, S. Jaudon, trustee of M. T. B. Jaudon, for value received, have bargained, sold, assigned, and transferred, and by these presents do bargain, sell, assign, and transfer unto names in margin of transfer-book, seventy shares of the joint-stock of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Company, standing in my name on the books of the said companies, and do hereby constitute and appoint F. S. Conover my true and lawful attorney, irrevocable, for me and in my name and stead, but to their use, to sell, assign, transfer, and set over, all or any part of the said stock, and for that purpose to make and execute all ne-

109 cessary acts of assignment and transfer, and one or more persons to substitute, with like full power, hereby ratifying and confirming all that my said attorney or his substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 16th day of October, one thousand eight hundred and seven.

S. JAUDON,
Trustee of M. T. B. Jaudon.

Sealed and delivered in the presence of—
J. C. HULL.

[Twenty-five cent U. S. internal revenue stamp on the back of the power.]

Joint-stock of the Delaware & Raritan Canal Company & Camden & Amboy Railroad and Transportation Company.

[VIGNETTE.] [VIGNETTE.]

No. 2673.] [VIGNETTE.] [Shares, 19.

STATE OF NEW JERSEY.

OFFICE OF THE CANAL COMPANY.

This is to certify that S. Jaudon, trustee for Mrs. Mary T. B. Jaudon, is entitled to nineteen shares in the capital stock of the Delaware & Raritan Canal Company, subject to an agreement entered into between the Delaware & Raritan Canal and Camden & Amboy Railroad and Transportation Companies, of the one part, and the Philadelphia and Trenton Railroad
110 Company, of the other part, dated April 22nd, 1836, providing, among other things, that, from and after the first day of June, then next ensuing, the clear profits arising from the stock of the said companies should be divided among all the stockholders of the said several companies, share and share alike. Transferable on the books of the company, and on surrender of this certificate, only by him or his legal representative.

$100 each share.

[Capital stock, three millions] [VIGNETTE.]

Witness our hands and the seal of the company, at Princeton, N. J., this twenty-seventh day of January, 1852.

[SEAL.] R. F. STOCKTON,
President.

RICHARD STOCKTON,
Treasurer.

[U. S. int. rev. stamp can.]

Joint-stock of the Delaware & Raritan Canal Company & Camden & Amboy Railroad and Transportation Company.

[VIGNETTE.] [VIGNETTE.]

No. 2305, N. C.] [VIGNETTE.] [Shares, 28.

STATE OF NEW JERSEY.

OFFICE OF THE CANAL COMPANY.

This is to certify that S. Jaudon, trustee of Mrs. Mary T. B. Jaudon, is entitled to twenty-eight shares in the capital
111 stock of the Delaware & Raritan Canal Company, subject to an agreement entered into between the Delaware & Raritan Canal and Camden and Amboy Railroad and Transportation Companies, of the one part, and the Philadelphia and Trenton Railroad Company, of the other part, dated April 22d,

$100 each share.

1836, providing, among other things, that, from and after the first day of June then next ensuing, the clear profits arising from the stock of the said companies should be divided among all the stockholders of the said several companies, share and share alike. Transferable on the books of the company only by him or his legal representative.

[Capital stock, six millions.] [VIGNETTE.]

Witness our hands and the seal of the company, at Princeton, N. J., this fourteenth day of April, 1864.

R. F. STOCKTON, *Pres't.*

RICHARD STOC'TON,
Treasurer.

Annexed to the foregoing two certificates, Nos. 2673 and 2305, by a pin, is the following stock power:

Irrevocable stock power.

Know all men by these presents that I, Sam'l Jaudon, trustee of M. T. B. Jaudon, for value received, have bargained, sold, assigned,
112 and transferred, and by these presents, do bargain, sell, assign, and transfer unto Joseph R. Wilkins, forty-seven (47) shares of the joint-stock of the Delaware and Raritan Canal Co. and Camden & Amboy R'road and Transp'n Co., standing in my name on the books of the said companies, and do hereby constitute and appoint F. S. Conover my true and lawful attorney, irrevocable, for me and in my name and stead, but to their use, to sell, assign, transfer, and set over all or any part of the said stock, and for that purpose to make and execute all necessary acts of assignment and transfer, and one or more persons to substitute, with like full power, hereby ratifying and confirming all that my said attorney or substitute or substitutes shall lawfully do by virtue hereof.

In witness whereof I have hereunto set my hand and seal the 18th day of April, 1864.

S. JAUDON, [L. S.]
Tr. of M. T. B. Jaudon.

Sealed and delivered in the presence of—
W'M FITCH.

[25 c. int. rev. stamp can.]

10. Q. In respect to these two powers, who filled up the blanks?
A. I filled up the blanks.
11. Q. For what?
113 A. For the transferees—in one by inserting the names in maggin transfer-book, and in the other the name of Joseph R. Wilkins; also a blank for F. S. Conover, for the attorney to make the transfer.
12. Q. That is all?
A. That is all.
13. Q. When were those blanks filled by you?
A. At the time the transfer was made.
14. Q. The time the certificates were returned?
A. At the time the certificates were returned to the company and the transfers made to other parties.
15. Q. Can you tell about what time that was from the papers?

A. I cannot. I am not positive; but I think one was about the 20th of October, 1867, and the other was about the 12th of December, I think.

16. Q. Which, from your recollection, was transferred in October, 1867?

A. I do not remember whether it was the forty-seven shares or the seventy shares—the two making, in the aggregate, *forty-seven* shares.

F. S. CONOVER.

Subscribed and sworn to before me this 2nd day of August, 1870.

THERON GEO. STRONG,
Notary Public N. Y. County.

114 AUGUST 4TH, 1870.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

WILLIAM B. DUNCAN, being duly sworn, says:

Direct examination by Mr. Strong:

1. Q. You are one of the defendants in this action, and one of the firm of Duncan, Sherman & Company, the other members of the firm also being defendants?

A. Yes, sir.

2. Q. Do all the defendants, members of your firm, reside in the city of New York, and are they citizens of the State of New York?

A. No. Three reside in the city of New York, and one does not.

3. Q. Where does the other reside?

A. In Providence, Rhode Island. That is Mr. David Duncan.

4. Q. Is he a citizen of Rhode Island?

A. Yes, sir.

5. Q. The other members of the firm residing here are citizens of the State of New York?

A. Yes. Two of them.

6. Q. Did you verify the answer of the members of your firm who are defendants in this action?

A. Yes, sir.

115 7. Q. Referring to the transaction therein stated with Mr. Samuel Jaudon, was it conducted, on the part of the members of your firm who are defendants, by yourself exclusively?

A. I was the only member of my firm who conducted it.

8. Q. Will you state the commencement of that transaction, giving the application?

A. Mr. Samuel Jaudon came personally into my office, and asked me if I would a'vance him for, I think, sixty days, upon some securities. I having personal relations with Mr. Jaudon, although not business ones, made an exception to the general rule of our office, which is not to do things of that character. I said I certainly would, if he would give me proper security. He then stated to me that he had some Camden and Amboy stock. On inquiring further, I ascertained that it was a stock which was connected with the Camden and Amboy Road, and virtually the same; and that it was abundantly good for the amount of money that he asked. I said, "Well, to oblige you, Mr. Jaudon, I will do it with pleasure." I then called to my cashier, Mr. Hull, and desired him to let Mr. Jaudon have whatever the sum was at that time, upon

116 this amount of the stock which he named to me, which had a considerable margin upon it. On the maturity of the note, which I

think Mr. Jaudon gave at the time I agreed to let him have the money, he came to me and asked if I would direct the stock sold, and render him an account for the same. I think at that time, also, I gave him an additional advance of a few hundred dollars. I told Mr. Hull to carry out Mr. Jaudon's instructions, and had some conversation with Mr. Jaudon at that time about what he was doing, and in which Mr. Jaudon mentioned to me he was making some change of security—in some coal bonds. I knew nothing more of the transaction, except the cashier carried out my instructions, or Mr. Jaudon's instructions rather, and sent the stock there to Philadelphia and sold it, and rendered the account for the transaction, so far as Mr. Jaudon and ourselves were concerned.

9. Q. Did Mr. Jaudon give a note for the amount you advanced to him?

A. I take it for granted he did. I suppose so.

10. Q. Can you state what entries were made upon the books of your firm in regard to the transaction?

117 A. The usual entries in such cases. I could not state them definitely. They can be furnished from the entries.

11. Q. You have not examined them with a view—

A. Not with a view to answer any questions you might give.

12. Q. Had your firm called upon Mr. Jaudon for payment of the loan before the conversation about the sale of the securities?

A. If my recollection serves me right, it was at the maturity of the loan that Mr. Jaudon came in and made this request.

13. Q. Did he say anything in regard to his inability to pay as a reason for requesting it to be sold?

A. No; he did not.

14. Q. When was that stock sold?

A. Between the 11th and 21st of October, 1867.

15. Q. At what date was the loan made?

A. The loan was made in the latter part of July—the 18th of July.

16. Q. Upon what time?

A. Sixty or ninety days.

17. Q. And the sale was made when?

A. The sale was made in October, between the 11th and the 21st.

18. Q. How many shares of the stock?

A. Seventy shares.

118 19. Q. For what amount was the stock sold?

A. At the current price, netted, according to this statement, $8,699 12.

20. Q. That you believe to be correct?

A. I believe it to be correct.

21. Q. Was that more than sufficient to pay the loan?

A. More than sufficient to pay it.

22. Q. What was done with the balance?

A. The balance was paid to Mr. Jaudon—969 24.

23. Q. Did your firm have any other transaction with Mr. Jaudon of that character?

A. I think, previous, I had made some advances to Mr. Jaudon on other securities; but some time had elapsed between. No running account with Mr. Jaudon. Whatever I did with Mr. Jaudon was a special transaction.

24. Q. Any others that you had with him were some considerable time before?

A. Some considerable time before.

25. Q. Nothing open between your firm and him at that time?
A. No.
26. Q. Did you take any writing from Mr. Jaudon in reference to the sale of the collaterals in case of default?
A. A letter addressed by Mr. Jaudon, dated 11th October, 1867, is referred to in the statement made by us.
119 27. Q. I speak now of the time the loan was made, and the collaterals were received?
A. In regard to what?
28. Q. In regard to the sale of the collaterals in case of default—whether you took any written contract or authority?
A. I take for granted a note was given at the time, as is usual in such cases; that note contains the power to sell; all stock-notes contain the power to sell.
29. Q. Before the commencement of this action, was an application made on the part of the complainant, Mrs. Jaudon, to your firm, to restore this stock to the trust stated in the complaint, or to pay the amount, to be restored to the trust?
A. I have no recollection of any such.
30. Q. When was a claim first made upon your firm for the relief sought in this action?
A. A very long time after it had been dismissed from my mind.
31. Q. Was it before the commencement of this action?
A. Before the commencement of this action here in New York?
32. Q. Yes sir?
A. There was a suit in Philadelphia—it must have been—
120 33. Q. What do you say in regard to the suit in Philadelphia?
A. There was suit commenced in Philadephia.
34. Q. For this same relief?
A. For this same relief, I fancy. There was no personal application made to me or any of my firm, to my knowledge.
35. Q. Was there a conversation between the members of your firm on the subject, in regard to a claim being pending—a claim being made by Mrs. Jaudon against your firm?
(Conversation objected to.)
A. As I understand it, I knew nothing with reference to a suit against me, or paid no attention to it; but I was aware of a suit being brought against the railway company.
36. Q. What I desire to know is, whether you had knowledge, in any way, a considerable time previous to this action, that Mrs. Jaudon made this claim against your firm, which is made at the present time?
A. I did, of this suit that was being brought in Philadelphia, against the railroad company; I didn't consider there was any claim against me until suit was brought here in New York.
121 37. Q. Then you have no present recollection of any demand having been made in behalf of Mrs. Jaudon upon your firm for the relief now sought, until the commencement of the present action?
A. No, sir; none.

Cross-examination by Mr. Larocque:

38. Q. If I understand you correctly, the arrangements for the loans that were made to Mr. Jaudon were made between Mr. Jaudon and yourself personally?
A. Yes, sir.
39. Q. By whom was the detail of the business of making the loan?
A. By my cashier—always the case—Mr. J. C. Hull.

40. Q. At the time of the application to you, for a loan, did Mr. Jaudon exhibit to you the certificate of stock upon which he asked for the loan?

A. He did not, to my recollection.

41. Q. Did he at any time exhibit to you this certificate of stock?

A. I don't think I ever saw it.

42. Q. And the substance of what occurred was, that you assented to the making of the loan, by your firm, of a certain amount of money,
122 upon so many shares of the stock of this corporation, and authorized your employees to carry out that arrangement?

A. Exactly.

43. Q. You have said something about this loan on time, asked for by Mr. Jaudon, being contrary to your custom; your firm were in the habit of making loans on securities, were they not?

A. Certainly.

44. Q. Part of your regular business?

A. Yes, sir.

45. Q. But those loans are usually made how?

A. You were wrong in saying to make a loan upon securities on time, is contrary to our custom; what I meant by that is this, that Mr. Jaudon had no business relations with me, was not known to be in the street, and he came to me and asked me for a loan, and I made it. Bankers are not in the habit of lending indiscriminately, right and left. Mr. Jaudon, I knew, was an old operator here.

46. Q. The transaction then, was not an extraordinary transaction; it was part of the regular business of your firm?

A. Of course.

47. Q. What you meant by saying it was "contrary to your
123 custom," was simply that Mr. Jaudon's relations to your house were not such as entitled him to a loan, but for your personal relations?

A. Yes, sir.

48. Q. Now, in the same way, at the time this small loan was made, in October, of six hundred dollars, that was made upon the application of Mr. Jaudon to you?

A. I think so.

49. Q. And without the exhibition to you of securities?

A. Yes, sir.

50. Q. And it was carried out through your cashier, Mr. Hull?

A. Yes, sir.

51. Q. Do you, of your own knowledge, know whether any note was taken for the money loaned upon these securities; have you any recollection?

A. No.

52. Q. You sometimes loan on securities, without a note, do you not? (Objected to.)

A. It is quite enstomary.

53. Q. And is it not now more generally done in that way than by notes?

(Objected to.)

A. Yes.

54. Q. These loans to which you have testified, please say
124 whether they were made upon the faith of the collaterals, or upon the faith of Mr. Jaudon's personal credit?

A. Made upon the faith of the collaterals.

55. Q. And without the collaterals, would you have made these loans?

A. Certainly not.

56. Q. What did Mr. Jaudon describe the securities as being, upon which he asked for this loan?

A. Seventy shares of Camden and Amboy stock.

57. Q. Is that all he stated on the subject of what they were?

A. Yes sir.

58. Q. Did he say anything as to the capacity in which he held the shares?

A. No.

59. Q. That is, as to his right to dispose of them?

A. No.

60. Q. Nothing said on that subject?

A. No.

61. Q. Was it to you, personally, that Mr. Jaudon spoke, on the subject of the sale of these shares?

A. Yes, sir.

62. Q. Now state, as nearly as you can recollect, what he said about the sale.

A. He wished these shares sold, and I told him to tell my cashier
125 to carry out his wishes, and referred him virtually to my cashier. The shares were unsaleable in New York, and naturally they would go to Philadelphia for sale; Philadelphia is the market for Camden and Amboy shares; they are not called up in this board—not current here.

63 Q. And the sale was made in pursuance of those instructions?

A. In pursuance of those instructions.

64. Q. Had you any other security for these loans to Mr. Jaudon than these seventy shares?

A. Nothing, whatever.

65. Q. Did you ever see the will mentioned in the bill of complaint in this action?

A. No.

66. Q. Or any copy of it prior to the commencement of this action?

A. No.

67. Q. Or had you any information, of any kind, as to the provisions of that will?

A. None, whatever, sir.

68. Q. Had you any knowledge, or notice of any kind—you personally—of the fact that Mrs. Mary Jaudon had, or claimed, any interest in this property?

(Objected to.)

A. None, whatever.

126 Re-direct examination by Mr. Strong:

69. Q. You read the answer of yourself and associates in the action before you verified it?

A. Yes, sir; I read it at the time I signed it.

70. Q. And the statements in the answer—

A. To the best of my knowledge and belief are correct, as I then swore.

71. Q. What entry, in the usual course of business, would be made in your books in such a transaction?

A. Entry of loans: Loans charged so much.

72. Q. Charge loans or notes receivable—

A. The amount of the loan.

72. Q. Any other entries?

A. No other entries—loan account or bills receivable, depending altogether upon the nature of the loan. We have bills discounted, bills receivable, and a loan account.

74. Q. In which of these accounts would the transaction, in the ordinary course of business, be entered?

A. In the loans. If a note was given on time—for a specified time—it would be in bills receivable; if it is on demand it would be in loans.

127 75. Q. You have spoken of the general course of business in respect to omitting to take notes in such cases; has that practice grown out of the internal-revenue act, enforcing tax upon notes?

A. I fancy it has.

76. Q. The accounts are substantially the same without making a note part of the transaction?

A. There is no written personal obligation.

77. Q. It is charged to the party in the account?

A. Yes, sir.

78. Q. And the securities are collateral to this loan?

A. Yes, sir.

79. Q. Do you recollect whether there was any conversation, whatever, between you and Mr. Jaudon, in this transaction, in reference to the purpose for which he wanted the loan, or the application which he designed to make of the loan?

A. There was a casual conversation, in which, if my recollection serves me right, Mr. Jaudon spoke to me of his having invested certain moneys in some bonds of a coal property, which were very valuable, and which would be a desirable change of investment.

80. Q. When was that?

A. That was during the pendency of the loan; probably when he came in to get the six hundred dollars; either then, or when
128 he requested the stock to be sold, and not at the time the loan was taken.

81. Q. It was either when the six hundred dollars were obtained subsequently, *or* when the conversation took place in reference to the sales?

A. I am not so sure of that; when he asked for the accommodation he told me about his coal bonds, and I asked him about them afterwards, I recollect, and then he told me what it was. It was when he borrowed the money he spoke to me about his making investments in some coal bonds, and it was later on—I suppose my natural curiosity to know what every body was doing—I extracted from him that it was Broad-top coal bonds, if I recollect aright.

82. Q. Your books will show what entries were made in regard to the transaction?

A. Yes, sir.

83. Q. Will you, upon application, furnish us with a transcript of your books, and allow us, if we desire, to look at them?

A. Certainly.

By Mr. Larocque:

84. Q. In this conversation, that you have spoken of, with Mr. Jaudon, was there or not any reference to any interest of any *any*
129 other person in this investment?

A. Not the slightest.

W. BUTLER DUNCAN.

Subscribed and sworn to before me, this 9th day of August, 1870.
THERON GEO. STRONG,
Notary Public N. Y. County.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

AUGUST 2, 1870.

SAMUEL JAUDON, for complainant, called and sworn.

Direct examination by Mr. Strong:

1. Q. Are you one of the def'ts in this action?

A. Yes, sir.

2. Q. (The certificates of stock shown to witness as follows, being Delaware & Raritan Canal Co.:

One certificate of 70 shares, No. 2665;
Another certificate, No. 2673, for 19 shares; and
Another certificate, No. 2305, for 28 shares,
With stock powers annexed, as referred to in the testimony of Francis S. Conover.)

3. Q. Were those certificates of stock issued to you by the Delaware and Raritan Canal Co.

130 A. Yes, sir; these are the original certificates issued to me, and these are my original powers of attorney. These powers of attorney are the original powers of attorney in my handwriting, signed by me, for the transfer of those stocks, the names of the transferees of the parties being left in blank by me.

3. Q. And the name of the attorney also left in blank?

A. Yes, sir; my own signature, as trustee, is there, of course, on each of the powers of attorney.

4. Q. Are those certificates themselves in the precise form they were when you received them?

A. Precisely as I received them.

5. Q. State whether they contained the words "trustee for M. T. B. Jaudon," as they now appear in the certificates, when they were issued to you.

A. Yes; one of 70 shares, "trustee for Mrs. Mary T. B. Jaudon;" and these two certificates, one for 19 shares, "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," and one for 28 shares, "S. Jaudon, trustee of Mrs. Mary T. B. Jaudon," and power of attorney signed by me, as trustee for M. T. B. Jaudon.

6. Q. In reference to each of the powers of attorney, they were signed in that way?

A. Yes, sir.

131 7. Q. To whom did you dispose of the two certificates of shares—19 shares and 28 shares?

A. To the National City Bank.

8. Q. To whom did you dispose of the other certificates?

A. This other certificate to Duncan, Sherman & Co.

9. Q. With whom did you do the business of the transfer to Duncan, Sherman & Co?

A. With Mr. Duncan, I think, himself.

10. Q. W'm B. Duncan?

A. W'm Duncan, I think, himself—yes, W'm B. Duncan—he was an old acquaintance of mine.

11. Q. With the City Bank with whom did you do business?

A. With Mr. Cartwright, cashier.

(It is consented that the copies of the certificates and powers, as they

will appear in the minutes of the stenographer, may be used in place of the original, with like effect as if the originals were themselves produced,

The certificates marked for identification as follows:

Certificate No. 2305, for 28 shares, marked Ex. No. 2, Aug. 2. A. E. C.

132 Certificate No. 2673, for 19 shares, marked Ex. No. 3, Aug. 2, 1870. A. E. C.

The power of attorney attached to above-marked Exhibit No. 4, Aug. 2, 1870. A. E. C.

Certificate No. 2665, for 70 shares, marked Exhibit No. 5, Aug. 2, 1870. A. E. C.

The power of attorney attached, marked Exhibit No. 6, Aug. 2d, 1870. A. E. C.)

Adjourned till Thursday, Aug. 4, 1870, at 11 a. m.

NEW YORK, *August* 4, 1870.

The direct examination of Samuel Jaudon resumed as follows:

By Mr. Strong:

12. Q. Where do you reside?

A. In the city of New York, in 39th street.

13. Q. You are a citizen of the State of New York?

A. Yes, sir.

14. Q. Do you know the complainant, Mary T. B. Jaudon?

A. Yes, sir.

15. Q. Is she the wife of your brother?

A. My brother, Charles B. Jaudon.

16. Q. Where do they reside?

A. In Philadelphia.

133 17. Q. Are they citizens of the State of Pennsylvania?

A. Yes, I think so—for the last forty years, I guess.

18. Q. Is the complainant a daughter of Commodore Bainbridge?

A. Yes, sir.

19. Q. Where did he reside?

A. His home, I believe, was in Philadelphia.

20. Q. About what time did he die?

A. Somewhere about 1833 or '4.

21. Q. Did the complainant receive any property under the will of her father?

(Counsel for defendants objects generally, that the defendants are not interested in that question, whether she inherited any property or not.)

A. She did; as one of the daughters of Commodore Bainbridge, she shared in his estate, according to his will, with her sisters.

22. Q. Her father left a will, did he?

A. Yes; he left a will.

23. Q. Was the property left by Commodore Bainbridge vested in trustees for the benefit of his children?

(Objected to.)

A. I think his will so directed.

24. Q. Were you afterwards appointed a trustee?

A. The trustees appointed by his will, resigned—declined serv-

134 ing—and I was afterwards appointed trustee by the court, in place of those trustees named in his will.

25. Q. And as such trustee did a considerable amount of property come into your possession?

A. Yes, sir.

26. Q. Was any portion of the property invested in the stock certificates in reference to which you have already testified?

A. These shares of Camden and Amboy? No.

27. Q. Delaware and Raritan?

A. No, sir.

28. Q. Was any part of it, at any time, invested in those shares?

A. Never until I did it myself.

29. Q. My inquiry is, whether you or any one invested a portion of that property in that stock of the Delaware and Raritan Canal Company?

A. Yes; it was done by me as trustee of those securities.

30. Q. When was it done; whether at the dates of these certificates or at any other time?

A. I am not able to reply certainly; but my impression is that, very soon after I was appointed trustee, the securities which I had were sold, and converted partially into those Delaware and Raritan bonds for the purpose of a larger income.

135 31. Q. When was that time with reference to the date of those stock certificates?

A. I have not examined to know positively; but it must have been very soon after I was trustee.

32. Q. I ask in regard to the dates?

A. I cannot remember the date when I was appointed trustee.

33. Q. Were those stock certificates issued to you at the time you made the investment in those shares?

A. Yes; the date of those certificates undoubtedly shows the date when I invested them for the estate.

34. Q. Were the certificates for the shares issued to you at the time you made the investment in that stock?

A. Yes, sir.

35. Q. When were the stock powers executed by you?

A. At the date of the loans—accompanied the certificates at the date of the loans—in the City Bank; the original date because the powers were not changed afterwards; they were renewals.

36. Q. I notice that the stock power attached to the certificate for seventy shares, which was pledged to Duncan, Sherman and Company, as has been stated, is dated the 16th day of October, 1807; is there any mistake in reference to that date?

A. Certainly; it must have been a mistake.

136 37. Q. What time was it?

A. 1867, probably.

38. Q. Will you state the transaction connected with the pledging of the seventy shares to Duncan, Sherman and Company from the commencement?

A. I called upon Mr. Duncan, as an old acquaintance, to ask him to make me a loan—if he would loan me seven thousand dollars. I had seventy shares of Camden and Amboy stock upon which I wanted this loan. He said he was perfectly satisfied, of course, and directed it to be made.

39. Q. Was anything said as to the time of the loan?

A. My impression was—whether I gave him a note at three months, or whether it was agreed to be three months, I don't know—my impression was that it was a loan intended to run for three months.

40. Q. In regard to whether a note was given or not?

A. I don't recollect positively whether it was or not. I do not think

I have any memorandum from which I can tell exactly whether a note was given or not. My impression is very strong that it was a loan intended to be paid in three months, and what confirms me in the
137 impression was that just three months from that date was the time when, finding myself utterly unable to pay it, I had to say to Mr. Duncan "the only way to pay it I know of is to sell it."

41. Q. Have you stated all that occurred on the application for and the making of the loan?

A. In regard to that I stated to Mr. Duncan that I thought I should want this loan for a very short time because I had a large property in the Broad Top Coal and Iron Company, which, I believed, was very valuable; the company was about in operation; that I expected it to turn out a very productive and highly-remunerative property, and I presumed I should be perfectly able and competent, within that time, to repay the loan from that source, and, I presume, in speaking to Mr. Duncan, I mentioned to him the expectations I had of meeting the payment from the investment which I had made in that stock.

Mr. LAROCQUE. (of counsel for defendant.) We object to that part of the answer in which the witness says "I presume," and so forth.

42. Q. Is that all that was said at that time?

A. In regard to the loan?

138 43. Q. Yes; on that application?

A. Well, I don't recollect anything distinctly further, excepting, in all probability, I stated to him the source upon which I calculated upon a repayment.

44. Q. You have now stated all that you recollect?

A. All that I recollect particularly in regard to the loan—to that loan?

45. Q. Will you state whether you had any consultation with Mrs. Mary T. B. Jaudon in reference to this pledging of the stock?

A. Not a word, sir; she was entirely ignorant of it.

(The latter part of the answer objected to.)

46. Q. Was that stock pledged with her knowledge and consent, so far as you know?

A. So far as I know, she knew nothing at all about it.

47. Q. For what purpose did you use the amount of this loan; I inquire whether it was for your individual and private purpose or otherwise?

(Objected to by defendant's counsel as being incompetent, immaterial, and irrelevant.)

A. I was going to say, sir, it was for the purpose of investment in securities which I hoped, one day or other, to turn over to her in
139 repayment. That was what I used it for. I thought it a desirable investment for their account.

48. Q. How did you use it?

(Objected to as before.)

A. I should be obliged to look back and see how I used it. I presume I used it for the purpose of meeting payments which I had become liable for in consequence of these investments, which I was contemplating ultimately to turn over—that is, of the Broad Top Coal and Iron Company; payments which I had become liable for; amount of stock which I had already contracted, subscriptions to be made.

49. Q. State how these investments were made, whether in your individual name and capacity, or otherwise.

(Objected to as before.)

A. In my individual name.

50. Q. Was any investment made by you in this coal stock otherwise than in your individual name, and on your individual account?

(Objected to as before.)

A. None in the name of either of these two parties.

51. Q. None of the parties to this action?

A. No, sir; none but myself.

52. Q. Do you know whether any part of the proceeds of this
140 loan of Duncan, Sherman and Company was invested in any of this coal stock?

(Objected to as before.)

A. Not specially, I presume—I think—not specially invested. It would have been included in the general investment, but not a particular special investment of any particular portion.

53. Q. What do you mean by that?

A. I simply said as I was indebted for this stock, this money went to pay a portion of the indebtedness, and, of course, went into the general transaction.

54. Q. Did the complainant in this case at any time receive or have any interest in any of this coal stock to which you have referred?

(Objected to as before.)

A. Never had any interest in it, sir, excepting my intentions.

55. Q. Did she have any knowledge whatever of what you did with the proceeds of this loan of Duncan, Sherman and Company, or of your intentions in respect to it, until long after the loan had been made?

(Objected to as before.)

A. I think she had no knowledge whatever of the loan, or of my intentions. I hoped to surprise her by giving her the property when it was ready to be transferred.

141 56. Q. Did that whole stock prove unprofitable and be'ome valueless?

(Objected to.)

A. The whole stock became unprofitable, and was sold out under a foreclosure, and became valueless.

57. Q. The transaction in it became a total loss?

(Objected to.)

A. A total loss; and there is a large quantity of that security now on hand that is not worth a snap of your finger. The foreclosure put an end to the value.

58. Q. Will you state what took place between you and Mr. William B. Duncan in respect to a sale of the seventy shares of the stock?

A. Simply, sir, the obligations becoming due, and payment being required, I had to tell him I couldn't pay in any other way but by his having recourse to the securities that were pledged.

59. Q. Do you mean to say you did so tell him?

A. I think there is no doubt I must have told him I couldn't pay when the obligation became due, in any other way, and he must sell the securities. I have no idea, in words, that I invited him to sell, for I should have been very glad to have him renew the loan. I told him I had no other way to pay that but by his selling the securities—ordering them sold.

142 60. Q. Was the balance paid over to you?

A. Yes, sir.

61. Q. About how much?

A. 969 24.

62. Q. Was the stock of the value at which it sold at that time?

A. Yes; sold at the market price.

63. Q. Will you state the transaction of the loan of the National City Bank from the commencement?

(Mr. Arnoux, of counsel for defendant, objects to the question, as going back of the loan made on the 12th of October, 1867.)

A. The commencement, according to my memoranda of the loan, was on the 18th of January, 1866, on this particular security.

64. Q. Will you state what application you made?

A. That loan was made on an application to Mr. Cartwright, cashier of the bank, upon an hypothecation of 47 shares of Delaware and Raritan Canal, and Camden and Amboy, and 25 shares of the stock of the 3rd Avenue Railroad, and a bond of Mississippi and Missouri Company for $500. Those were all the securities pledged.

65. Q. State what conversation took place between you and Mr. Cartwright, on the making of that loan.

143 A. I don't recollect; I don't think there was any conversation took place, excepting merely the exhibition of the securities, and his consent to loan upon that security. The question, simply, was such security sufficient? I don't think there was any other conversation.

66. Q. Do you recollect whether or not you gave a note or other writing upon that occasion?

A. I don't recollect; but my impression was, it was a loan on demand, but to wait until payment was called for, with the general idea that it was a loan of three months; that was the ordinary practice of the bank.

67. Q. Was there any writing between you?

A. I don't think there were any notes, or anything of that kind; if there had been, I presume it would have been a note on demand, with these securities.

68. Q. Was any memorandum made of the collaterals?

A. I made them myself, sir; whether Mr. Cartwright did, or not, I don't know.

69. Q. Did he, upon an envelope, or in any way?

A. I really don't know how that is.

70. Q. Was anything said in reference to a sale of the collaterals, in case of default?

A. I don't think anything was said specially *as* regard to it, because, in the first place, it was not contemplated such a thing would take place; in the second place, it is the ordinary course of practice.

144 71. Q. Was there any conversation between you and Mr. Cartwright, for the bank, in regard to the purpose for which you wanted the loan?

A. No, sir.

72. Q. Or what you intended to do with the funds?

A. I think not, sir; it is so unusual a thing, I am sure it could not have taken place.

73. Q. In respect to the continuance of the loan, or subsequent loans, was there any conversation as to the purpose for which you wanted the money, or what you intended to do with it?

A. I don't think there was, at any time during the continuance of the renewals of the loan, *at any time*, any conversation with regard to the purpose for which it was wanted.

74. Q. How was it as to loans, whether renewals or not?

A. Up to the time of the selling of these securities, from the time I first obtained the loan, there never was anything said by me to Mr. Cartwright, or any officer of the bank, as to the purpose for which the loan was made. I presume there was nothing of that sort that passed between us.

75. Q. What was the amount of the original?

145 A. $9,500.

76. Q. Give your statement of what occurred.

A. On the securities already mentioned, I have it here: On the 11th of April, I paid for that loan, with interest amounting to $151 41, $9,651 47; then that loan was renewed again upon the same securities, on the 11th of April, for the same amount, $9.500, and that loan continued until, as I have it, the 16th day of July, when it was paid off, with interest, amounting to $9,666 25; on the 18th of July, I renewed the loan again for the $9,500, and on the 10th of October, I paid the loan, with interest, $9,658 86; and then, on the 12th of October, I renewed the loan for $9,500, and, on the 24th of January following, I paid the loan with interest, $9,669 94; on the 18th of January, again I renewed the loan, same securities, $9,500, and, on the 10th of April, paid the loan, with interest, $9,651 47; on the 12th of April, I renewed the loan the same way, $9,500, and, on the 29th of June, paid it, with interest, $9,644 08; on the 3d of July, I again renewed the loan, $9,500, same securities; on the 10th of October, paid it, with interest, $9,690 58; on the 11th of October, I renewed the loan for $9,500, and, accord-

146 ing to my accounts, on the 18th of December, I got a further loan of $500, and, on the 10th day of December, 1867, 47 shares of Camden and Amboy were sold and the proceeds applied, $5,897 90, leaving a balance due upon the remaining securities, which I paid off, with interest, due on the 15th of January, $9,243 40; the interest account, $141 60, and closing the whole transaction. My statement shows $4,243 40, whereas this shows $3,743 70. That closed my transaction with the City Bank. And as in that case, I will say, as a matter of course, the bank was tired of lending me that loan, and Mr. Cartwright required the money. I told him I could not pay it, except by selling, and told him to sell the stock, as he had a right to do.

77. Q. Upon the complainant learning that these stocks had been hypothecated with Duncan, Sherman & Company, and to the National City Bank, did the complainant make any demand upon you in reference to restoring to the trust those stocks?

(Objected to as irrelevant to the defendants, National City Bank and Duncan, Sherman and Company.)

A. Oh, yes; certainly, she became uneasy.

78. Q. And has done so repeatedly?

147 A. Oh, yes.

79. Q. Have you done so, or been able to do so?

A. I am sorry to say I have not; I would be rejoiced if I were able.

80. Q. For what purpose did you use the proceeds of the loans of the National City Bank, to which you have referred?

(Objected to, as irrelevant, incompetent, and inadmissible.)

A. It was intended to be applied to the purchase of these Broad Top securities; it had been used either for the direct investment or for the payment of obligations incurred for the investment. I will state that it stood in precisely the same position as that which I have already testified to, in relation to the moneys obtained upon the loan of Duncan, Sherman and Company; it was always intended to be applied in that way, to a property which I supposed would have been a very desirable investment for that purpose.

81. Q. Were all these purchases of that stock in your individual name, and on your individual account?

(Objected to.)

A. Individual name, and individual account.

Adjourned until to-morrow, Friday, Aug. 5, 1870, at 10 a. m.

148 CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

NEW YORK, *Friday, Aug.* 5, 1870.

The direct examination of Mr. Samuel Jaudon, was resumed as follows:

By Mr. Strong:

82. Q. State whether or not your intention, which you have mentioned, and your expectations, in reference to turning over these securities of the Broad Top Coal and Iron Company to the complainant, was contingent upon the stock proving profitable, and the complainant being willing to receive it.

(Defendants' counsel objects on the ground of inadmissability and irrelevancy.)

A. Certainly, undoubtedly, if it were not profitable, she would not be willing to receive it, if I were to offer it to her.

83. Q. At the time of the transaction with Duncan, Sherman & Company did the defendants composing the firm do business in this city?

A. Yes, sir.

84. Q. And have they continued to do so up to the present time?

A. I believe so; yes, sir.

85. Q. Have you continued to act as trustee for the complainant up to the present time, since your appointment?

149 A. Yes; the trust has never been dissolved as far as I know.

86. Q. Among the property which you received as trustee for the complainant, were there United States loans, commonly called five-twenties, to the amount of $5,600?

A. There were loans of that kind; to what amount I don't recollect.

87. Q. Did you dispose of those loans?

A. The same way, and for the same purpose and object.

88. Q. Do you recollect about what time it was done?

A. I do not recollect, sir.

89. Q. You have put in no answer in the action?

A. No, sir.

90. Q. The complaint has been taken as confessed against you?

A. Yes, sir.

91. Q. Did the complainant have any knowledge or give any consent in respect to the disposition or use of those United States loans?

A. None at all, sir; my whole intention was to surprise her by giving her something that was worth a great deal more than all the rest.

92. Q. You used that as you did the proceeds of these loans?

A. Precisely; I had done it frequently before.

150 Cross-examination by Mr. Arnoux:

93. Q. When did you first receive the securities into your possession belonging to this trust?

A. I believe it was in May, 1835.

94. Q. What securities came into your hands at that time?

A. I have no distinct recollection with regard to any of these securities, excepting a large parcel of Pennsylvania five per cents; they were among the securities.

95. Q. Do you know about how much?

A. I should be obliged to refer to my books; my impression is twenty or thirty thousand dollars; I have no distinct recollection.

(Complainant's counsel objects to any evidence in regard to property which the witness received as trustee for any other person than the complainant.)

96. Q. What did you do with those securities?

(Objected to by complainant's counsel, so far as the question has reference to securities, held as trustee for others than the complainant.)

A. The Pennsylvania securities, so far as I recollect, more particularly than anything else, were sold, and the investment made in Camden and Amboy stock, and Delaware and Raritan.

151 97. Q. How large an amount did you invest in this canal stock?

(Like objection.)

A. I have invested a certain proportion divided among the heirs. I cannot tell precisely.

98. Q. How many shares under that arrangement did you divide out to Mrs. Jaudon's trust?

A. My impression is that from the Pennsylvania loan, or from others, the first investment was the 47 shares—the 19 and 28; among the earliest changes was that, that being the precise object. There was a subsequent arrangement, or reinvestment, by which these 70 shares were purchased as a reinvestment of that same property, on her individual account. These were all invested under that trust, relating to Mrs. Jaudon and her issue.

99. Q. When were the 47 shares obtained?

A. I could only tell that by looking at the date of the certificates.

100. Q. At the time of the dates of the certificates?

A. At the date of the certificates, or about the dates mentioned.

101. Q. Were those 70 shares the purchase from a subsequent disposition of the original investments, or was it dividends?

A. No, sir; it was a later reinvestment of some of the original securities, as far as my recollection goes.

152 102. Q. What securities did you convert in the later investment?

A. That I really cannot tell without looking at the papers. The only thing that impressed it upon my memory was the Pennsylvania fives, because that was a very desirable item to be got rid of, as being only a five per cent. loan.

103. Q. By "Pennsylvania fives" you mean an investment drawing five per cent. interest?

A. Yes; a loan of the State of Pennsylvania—five per cent. loan; they were only five per cent. stocks.

104. Q. At what price did you sell these five per cents., as near as you can recollect?

(Objected to as immaterial.)

A. I don't recollect without looking at the papers. I presume at that time they were not very far from par.

105. Q. What price did you pay for the Delaware and Raritan stock?

A. My memory, of course, is at fault in the same way; my impression is that it was between 120 and 130.

106. Q. What dividends did they average?

(Objected to as immaterial.)

A. At that time I cannot tell, but it averages about five per cent. half yearly, which is double the Pennsylvania fives; perhaps so early as that they may not have made so large dividends.

153 107. Q. But your recollection is that the dividends have averaged about five per cent. semi-annually?

A. Yes, sir; and occasional extra dividends, and those extra dividends, when made, were made in stock, and were handed over to her and she has them now.

108. Q. Do you know how much extra dividends have thus been made and handed by you to her?

(Objected to as irrelevant and immaterial, and on the ground that there is no issue on that subject.)

A. I shall have to examine all my books to ascertain that.

109. Q. Can you not examine your books and ascertain the price that you sold the Pennsylvania fives for, the price you paid for the Delaware and Raritan stock, and the stock dividends you have paid over to Mrs. Jaudon?

A. I can, but so many years have elapsed it will take a good deal of time.

110. Q. Did you make the sale of these Pennsylvania fives with the knowledge or consent of Mrs. Jaudon?

A. Yes; with her express desire.

111. Q. Did you make the investment in the Delaware and Raritan stock with her knowledge and consent?

154 A. I did sir.

112. Q. What did she say to you on the subject?

A. Oh, sir, I cannot, of course, recollect anything of the kind. Our relations were such that I know she considered I was acting very judiciously, and she was very glad of it.

113. Q. Didn't she express a desire that you should make a sale of the five per cent. Pennsylvanias, and make an investment that would give her an enlarged income?

(Complainant's counsel objects to any answer, except such as is founded upon present recollection of what was said at the time.)

A. That was the precise object of my accepting the trusteeship—that I might make a change of investment.

(Objected to.)

114. Q. At her request?

A. At her request, and at the request of all the heirs.

(Objected to as to the other heirs.)

115. Q. Do you know the reason why the testamentary trustees resigned?

(Objected to.)

A. I know what was understood to be the reason.

116. Q. From whom did you understand it?

A. From Mrs. Jaudon, as one of them. They all kept together.

155 117. Q. What did Mrs. Jaudon tell you was the reason that those testamentary trustees resigned their trust, as near as you recollect?

A. My recollection is that she and all the heirs (objected to) wanted an investment that would produce a larger income, and the first set of trustees were unwilling to make any changes.

(Objected to as immaterial; whether they were willing or unwilling is of no materiality.)

118. Q. And did Mrs. Jaudon tell you that she and the heirs requested those trustees to resign, so that some one might be appointed who would make such investments for them?

A. Whether she told me so, I cannot pretend to say.

119. Q. I mean in substance?

A. It was her wish and desire as expressed.

(Objected to.)

120. Q. Do you mean as expressed to you?

A. As expressed to me; yes, sir; it was a plain fact that there was a succession, and the reasons were what I have alluded to.

121. Q. If the investment in the Broad Top Coal Company had resulted as you anticipated, would not the income of Mrs. Jaudon have been still further increased?

(Objected to.)

A. It would, sir, undoubtedly—largely.

122. Q. Was not that increase the purpose for which you made that investment?

156 (Objected to.)

A. It was my object, undoubtedly.

123. Q. Was it not Mrs. Jaudon's wish that the investment should be changed, from time to time, if, by so doing, the income could be increased?

(Objected to on the ground that the inquiry should be as to what was said.)

A. I understood it to be her wish, whenever the income could be increased by other investments.

124. Q. And did you understand that by conversations with her?

(Objected to.)

A. Yes, sir.

125. Q. Did she leave to your discretion the precise character of the re-investment to be made?

(Complainant's counsel objects on the ground that the question should be as to what, if anything, was said on the subject of the investment in the Delaware and Raritan Canal Company's stock.)

A. I don't think there was any specific conversation with regard to a change of investment.

By Mr. Strong:

126. Q. After you purchased the Delaware stock?

157 A. No, sir; I was going to add, particularly, none in relation to the changes in the Delaware and Raritan Canal stock?

127. Q. In general, from conversation with her, were you not at liberty to make such re-investments as, in your judgment, would increase the income?

(Objected to as not calling for the conversation, but the witness's understanding from them.)

A. That was my general understanding. Any changes that I deemed advisable for her interest would be approved by her.

128. Q. Will you please to state, as nearly as you can, the conversation or the language that was used in giving you such authority?

A. It is so many years ago, I could not recollect any distinct conversation; only the general impression, as I have it on my mind, that that was the uniform understanding.

129. Q. Was Mrs. Jaudon aware that you had changed the securities and made the re-investment which you speak of, for the other heirs as well as herself?

(Objected to as immaterial and irrelevant.)

A. Oh, yes.

130. Q. Did she ever express any disapprobation of the re-investment that you had made for her or for them?

A. Never expressed any objection to them; on the contrary, very well satisfied, I believe.

158 131. Q. Did she say anything to you at the time that these investments in the Delaware and Raritan stock was talked about, to use your discretion?

A. My best recollection is that we distinctly spoke of the Delaware

and Raritan as one of these stocks which would be substituted for stocks held, that came from my predecessors.

132. Q. Was that investment on your suggestion and advice?

A. I think it was.

133. Q. Did Mrs. Jaudon, from time to time, know that you were paying to her dividends on that stock?

A. Certainly; I have her receipts for the dividends.

134. Did she ever, at any time, decline to receive those dividends, or express any disapprobation of the investment from which they were received?

A. Never objected to the dividends or to the investment. Not only that, but I continued to pay her the dividends on that stock after it was sold.

135. Q. Down to what date did you pay her dividends purporting to be the dividends on that stock?

(Objected to as irrelevant and immaterial.)

A. I cannot tell what date it was, but some time after the stocks
159 were sold, under the expectation of replacing them, I continued to pay the dividends as if it had been received. My recollection is that I paid two or three such dividends.

136. Q. What did you do with the balance of the moneys that were received on the sale of the 70 shares of stock pledged to Duncan, Sherman and Company?

A. I can remember with regard to six hundred and odd dollars of it, that I paid dividends as if that stock was still unsold—paid it to Mrs. Jaudon as for dividends on these shares; not only the 70 shares, but the 47 shares.

137. Q. On the whole?

A. On the whole.

138. Q. Did you not, at the time that you were called upon to pay the loans, authorize the sale of the shares?

A. My impression is, and belief, that I, on both occasions, said to Mr. Duncan: "I am unable to pay this loan, and you must resort to a sale, according to your authority to do so."

139. Q. And you authorized them to do it?

(Objected to.)

A. I cannot say I authorized them, but I said, what amounted to it, I suppose, "I cannot pay, and you have the power to sell."

160 140. Q. Did you say anything to them about where the stock should be sold, in Philadelphia or New York?

A. I don't know that I did, sir; but, undoubtedly, if I had said anything about it, I should have said Philadelphia, because that was the usual place of sale. There were no transactions in that stock in New York, and even to this day, they could not probably have got a very fair price for it, without sending it to Philadelphia. It is not quoted on the New York Exchange; it is a Philadelphia stock.

141. Q. Then Philadelphia was, according to your best judgment, the place to sell it, and with your approval?

A. The best place to sell them, at the best price that could be got anywhere, I presume.

142. Q. What family has Mrs. Jaudon?

A. None at all, but her husband and her brother; no family; never had any child.

143. Q. Who, in the case of Mrs. Jaudon's death, are her next of kin?

A. Her sisters.

144. Q. Please tell who they are.

A. If I can remember all, there is Mrs. Thomas Hayes, Mrs. Louisa Hoff, the wife of Admiral Hoff, and Mrs. Mary Jaudon, widow of another brother. I cannot recollect whether there are more than three sisters.

161 145. Q. And those are all the daughters of—

A. Daughters of Commodore Bainbridge, her father. There are four sisters altogether, and the other three sisters would be her heirs, I presume, according to the will.

146. Q. When you applied to the City Bank for this loan of which you have testified, did you not state to Mr. Cartwright that you held certificates for 47 shares of this stock, and asked for the loan upon that, with other collateral as security?

A. My recollection is, as a matter of course, I mentioned to him the securities upon which I wanted the loan. I would not think of asking for a loan, without saying what securities I offered.

147. Q. Did Mr. Cartwright make any examination of the certificates, to your knowledge?

(Objected to as immaterial.)

A. I believe Mr. Cartwright did what every other man would do—what he always does. He must have taken those certificates in his hands, and turned them over to see if they had proper powers of attorney to transfer and dispose of them, and no doubt, he looked at them, and satisfied himself that they were certificates with powers of attorney attached.

148. Q. Was the power of attorney attached to those certifi-
162 cates on a separate paper affixed with a pin, as they appeared when produced here the other day?

A. I believe they were.

149. Q. Then such examination did not, in your recollection, involve an examination of the certificates themselves, in this instance?

(Objected to.)

A. Oh, I suppose so. The certificate was attached, and he must, undoubtedly, have looked at the certificate.

150. Q. I ask your recollection.

A. My impression is, of course, he examined the certificates, to know that they were what I stated them to be, 19 and 28 shares, and so on. How particular that examination was, I cannot tell.

151. Q. Have you any recollection?

A. No, sir.

152. Q. Did he, on any of the subsequent loans, to your recollection, examine these certificates?

A. My impression is that he did not take it for granted they were as they were originally. I presume he realized upon them.

153. Q. When you obtained the loan, did not Mr. Cartwright pay you the $9,500 in cash or its equivalent?

A. Well, I undoubtedly received the*y* money in some shape or other; in cash or check.

154. Q. And that was so, was it not, the last time that the loan
163 was paid, that you were paid the $9,500 in cash or its equivalent?

A. Oh, yes; I had paid for the loan, and the renewal would require necessarily the repayment to me of the money.

155. Q. And in both instances the loans were made to you, were they not, on the faith of the collaterals that were pledged?

A. Yes, sir; I may or may not have given a note on demand, paya-

ble to my order, as in some instances I probably did, and *and* in some instances I probably did not. It was a matter of accident. We give a note sometimes, and sometimes we do not.

156. Q. The loan was made to you, not on the strength of your promissory note, but on the value of the collateral?

A. Undoubtedly. I do not think he attached much value to my personal obligation.

(What the witness thinks is objected to.)

Cross-examination by Mr. Larocque:

157. Q. Did you ever have any conversation with any member of the firm of Duncan, Sherman and Company, on the subject of the pledging of these securities to them for the loan of money to you upon them with the exception of Mr. William Butler Duncan?

A. Never; never saw any members of the firm in relation to it,
164 except Mr. Duncan; he being the only gentleman with whom I have a personal acquaintance.

158. Q. With what individual were the details of your transactions with them consummated?

A. I really don't know, sir; probably with his cashier or his chief clerk.

159. Q. He was the clerk?

A. Some of his employees, undoubtedly.

160. Q. And were all your dealings with the same person?

A. That was the only transaction I had with the house.

161. Q. Were all your dealings with the same person in Duncan, Sherman and Company's employ?

A. I presume there was but one person.

162. Q. At the time of any of your interviews with Mr. Duncan, on the subject of this loan, or this proposed loan, was the certificate of stock exhibited to him?

(Objected to as immaterial.)

A. Whether it was ever exhibited to him at the first application or not, I do not know; but certainly it never was afterwards.

163. Q. Not to your knowledge then?

A. Not to my knowledge.

164. Q. The first amount you received on the pledging of this security, on the 18th July, 1867, was how much?

A. Seven thousand dollars.

165. Q. Subsequently you received how much?

165 A. The 16th of October I received $600.

166. Q. On the 21st of October what was the amount of those loans, including interest?

A. $7,729 88.

167. Q. On that day Duncan, Sherman and Company accounted to you for the proceeds of the stock?

A. $8,699 12; and they paid to me the balance due $969 24.

168. Q. At the time of these loans was your position as to credit such as to entitle you to ask for a loan without security?

(Objected to as immaterial.)

A. No, sir; it was not.

169. Q. Had the house with which you had been connected, failed in business?

A. I had not been connected in business with any house for a long time. The old house of S. Jaudon and Company—Mr. Henry G. Stebbins was one of the partners of that house—was in difficulties; but

those difficulties were all settled to Mr. Stebbins' great advantage, as shown by his position now. I unfortunately did not succeed in managing, individually, as well as he did. Therefore I was not in a position to ask for a loan on my own credit. I might further say I was not engaged in any business at that time—had no special business.

166 Re-direct examination by Mr. Strong:

170. Q. The investments, which you made for the complainant in the Delaware and Raritan Canal Company's stock, were made, as I understand you, with her consent?

A. Yes, sir.

171. Q. The moneys invested in those stocks, under their previous investments, were not bringing near so large a rate of interest?

A. No, sir; the interest was so much less that that was the reason for making the change.

172. Q. And the reason that was expressed by her?

A. The reasons expressed by her and all the rest of them, at the time of the change of trustees?

173. Q. After the investments in the Delaware and Raritan Canal Company's stock, was there any conversation between you and Mrs. Jaudon in reference to changing those investments?

A. Those particular investments?

174. Q. Yes.

A. No, sir.

175. Q. Did she, at any time, confer any authority upon you, or discretion, in reference to selling those stocks and making re-investments?

A. Nothing special of that kind ever occurred; general au-
167 thority to act as trustee, in my discretion; nothing in regard to those particular stocks whatever.

176. Q. Do you recollect any conversation between you and Mrs. Jaudon, after the investments in those stocks, in reference to making any other investments for her?

A. Involving a change of those stocks?

177. Q. Yes, sir.

A. Never.

178. Q. Was any discretion given to you in reference to those stocks?

A. No, sir; nothing ever passed between us in reference to those stocks at all.

179. Q. You spoke of a general discretion?

A. Well, a general discretion as trustee; that is all.

180. Q. Was there any conversation between you and Mrs. Jaudon, after the purchase of these stocks, in reference to your having a discretion as to re-investments which embraced these particular stocks?

A. No conversation whatever, referring to these securities; none at all, which I considered, because such a thing was not in contemplation at any time I had a conversation.

181. Q. As to changing the investment of these securities?

A. These particular securities. It was only my hope of doing better; that is all.

182. Q. Several questions have been asked upon your cross-ex-
168 amination, implying that you had re-invested the proceeds of this Delaware and Raritan Canal Company's stock, for the complainant. Have you re-invested for her, at any time, any of the proceeds of those stocks?

(Objected to as irrelevant, immaterial, and re-examining on matter of the direct examination.)

A. No absolute re-investment of the one kind. The intention was a different affair.

183. Q. Please explain what you mean by "intention" in that connection.

A. My intention was to offer them this Broad Top security, which I believed to be far more valuable and productive, and therefore more acceptable than those securities, in place of those securities.

184. Q. Your intention was to offer them?

A. My intention was to offer them, believing that they would do, as everybody else does, accept them as more satisfactory than what was given up.

185. Q. Were they offered to her?

A. Never directly or indirectly; it was a matter I kept within my own breast.

186. Q. Do you recollect of the payment of a dividend upon any of these Delaware and Raritan Canal stocks to Mrs. Jaudon, sub-
169 sequent to the payment, in the fall of 1867, out of the balance received from Duncan, Sherman and Company; it was out of that balance, was it not?

A. Yes, sir; I have a memorandum of the dividend which was remitted on the 7th of February, 1868, but whether that was a portion of this or not, I am not sure. There was a dividend remitted on the 7th of February, 1868.

188. Q. Whether a portion of the balance or not, you are unable to say?

A. Whether that balance run over, I cannot say; but a remittance was made on that day.

188. Q. Have you any recollection of paying her, on account of dividends, anything after that time?

A. I have no recollection; I don't remember; I should have to examine and see.

189. Q. Aside from the payment of these sums, on account of dividends, as you have mentioned, you have not restored to the trust, or paid to Mrs. Jaudon, anything on account of these stocks?

A. I think not at all.

190. Q. After obtaining the loan of Duncan, Sherman and Company, to whom did you deliver the stock, or receive the proceeds of the loan?

A. I really am unable to say.

170 191. Q. Was it the cashier from whom you received the money?

A. That I am not able to say, but Mr. Duncan did not attend to those things, personally, therefore it must have been from his cashier, or his acting officer, whoever it might be.

192. Q. Did the party to whom you delivered it, examine it?

(Objected to, on the ground the witness has not shown that he knows to whom it was delivered.)

A. I do not know.

193. Q. When was the complainant first married, before or after your appointment as trustee?

A. I think after my appointment as trustee. It has been so very long ago, I cannot remember, but I think it was. It was somewhere about that time, probably.

Re-cross examination by Mr. Arnoux:

194. Q. In the general authority which you have said was given to you by Mrs. Jaudon to invest and re-invest, were these Delaware and Raritan stocks excluded?

(Objected to, that the question should be, "What was said?"

A. They were not excluded, and besides, this general authority
171 was given before the purchases were made in reference to the change of trusteeship—to the assumption of trusteeship.

195. Q. And this authority was in reference, then, to future investments and re-investments that might be made?

A. It was in reference to the whole estate, as I understand it.

196. Q. In reference to future time?

(Objected to as before.)

A. Yes, sir.

197. Q. Was not your intention to offer this Broad Top coal stock, present in your mind, at the time you made the investment in that stock?

(Objected to.)

A. That was my intention, with regard to all the moneys belonging to that estate, which came into my hands.

198. Q. But it was a present intention at the time you made the purchase?

A. That was the idea, that with that money I should get a security which would be more valuable and satisfactory—would be able to hand over securities which would be more satisfactory.

199. Q. Did you not take the money that you received from these loans for the purpose of converting them into this Broad Top coal stock, for Mrs. Jaudon?

(Objected to.)

A. All I can say, that was my ultimate purpose. But the par-
172 ticular investment I made of course I cannot tell without reference to my books.

200. Q. I am only asking in regard to your intention. Was not your intention, when you used that money, to use it for that particular purpose for her benefit?

(Objected to.)

A. My intention, when I used that money, was to have security which would be worth a great deal more to offer her in place of it.

201. Q. Did you, after you became trustee, make any other change of securities than those which you have mentioned of Pennsylvania fives, in the Delaware and Raritan stock?

A. Oh, yes; a number of others; the Pennsylvania fives were held to the account of the several trusts, four or five of the heirs all embraced, and I sold them and divided them, according to the interest of the different heirs.

202. Q. And in the other securities was Mrs. Jaudon interested?

A. Other securities under the will?

203. Q. Was the whole of Mrs. Jaudon's interest, under the will of her father, invested in Delaware and Raritan stock?

A. No, sir; it was not.

204. Q. Did you re-invest any other part of Mrs. Jaudon's interest in her father's estate in other securities?

173 (Objected to as irrelevant.)

A. That I cannot answer without looking at the figures.

205. Q. Can you not reccollect what you did?

A. I really cannot recollect what investments were made without referring to the papers.

206. Q. You only recollect this Delaware and Raritan stock?

A. This Delaware and Raritan stock simply, because it embraced the main part, and my impressions were so strong in regard to it, of course I could not very easily forget it.

207. Q. In respect to the other securities in which Mrs. Jaudon was interested, did you not sell those securities and subsequently re-invest the proceeds for Mrs. Jaudon's benefit?

(Objected to as irrelevant and immaterial.)

A. Yes; the other securities I sold from time to time, either as something became due, or something was received, or whatever was the ordinary course of transaction; money coming in, of course, was reinvested.

208. Q. In respect to the re-investments, did you consult Mrs. Jaudon in advance as to what investment should be made of them, or did you invest in your discretion, and afterward inform her?

174 (Testimony in regard to the investment objected to.)

A. I imagine, as I was in there, and had intercourse with her almost daily, at that time, it is, in all probability, when anything of that kind was done, I told her what I proposed to do.

209. Q. (By Mr. STRONG.) And obtained her advice?

A. I was guided by her opinion; I was in daily intercourse with her, and lived in the same neighborhood.

210. Q. You have no direct recollection that you did?

A. I have no direct recollection.

211. Q. Down to how late a period did you continue to make such re-investments?

A. That I cannot tell without examining the books.

212. Q. Give it as near as you can. Did you within ten years?

A. Oh, yes.

213. Q. Within five years?

A. That I cannot say; I can tell by examination, but I think it would be very imprudent for me to answer.

214. Q. Did you make re-investments of the proceeds of re-investments?

A. All I can say is, really, I cannot answer that question, except in a general way; as a matter of course, anything that came into my

175 hands from the payment of the investment was re-invested, *of course.* I continued to make re-investments as long as I had anything to invest.

215. Q. Did the other daughters of Commodore Bainbridge give you similar authority to that of Mrs. Jaudon, to invest and re-invest their securities?

(Objected to as immaterial.)

A. *I* did. I made investments for them in the same way, and subsequently handed them all over again, upon being discharged by the court, to all the others, excepting this unfortunate young lady. Every other portion of the estate I was discharged from; unfortunately she objected.

S. JAUDON.

Subscribed and sworn to before me this 8th day of August, 1870.

THERON GEO. STRONG,
Notary Public N. Y. Co.

CITY, COUNTY, AND STATE OF NEW YORK, *ss:*

NEW YORK, *August 5th*, 1870.

ALDACE F. WALKER, being duly sworn, testified as follows:

Direct examination by Mr. Strong:

1. Q. Are you the managing clerk in the office of Strong and Sheperd, the complainant's solicitors?

176 A. I am.

2. Q. Have you been so for more than a year past?

A. Yes, sir.

3. Q. Prior to the commencement of this suit, did you do anything in reference to a demand on Duncan, Sherman and Company in anticipation of the commencement of this action?

A. Yes, sir.

4. Q. State what.

A. On the 23d of September, 1869, I handed Duncan, Sherman and Company a letter at their office, corner of Nassau and Pine street'. I handed the letter to a person who said he was a member of the firm of Duncan, Sherman and Company in the back office. I don't know his name.

5. Q. *State* the letter if you have a copy of it.

(Objected to on the ground that the original has not been produced, which is the best evidence, and that no steps have been taken to make secondary evidence competent.

Counsel for complainant gives notice to the attorneys of the defendants Duncan, Sherman and Company, to produce the letter, and
177 offers to defer the examination until sufficient time has elapsed for procuring the letter.

Mr. LAROCQUE, (of counsel for defendants.) I answer that I propose to have search made for it, and if it is to be found to produce it; but that it will be impossible for me, consistently with my other engagements, to have that search made to-day.)

A. I read from a letter-press copy of the letter I handed to Duncan, Sherman and Company on the 23d of September, 1869:

THERON R. STRONG. } LAW OFFICE OF STRONG & SHEPARD,
ELLIOTT F. SHEPARD. } NO. 90 BROADWAY, CORNER OF WALL ST.,
P. O. box, 4374. } *New York, September 23d*, 1869.

Messrs. DUNCAN, SHERMAN & CO.

GENTS: As attorneys for Mrs. Mary T. B. Jaudon we hereby demand of you that seventy shares of Delaware and Raritan Canal Company stock, pledged with you in or about October, 1867, by Samuel Jaudon, in whose name they stood, as trustee for said Mary T. B. Jaudon, and which have since been sold by you, be restored to the said trust, together with all dividends since declared thereon, or that you pay the
178 value of said stock and dividends with interest.

Our chief clerk, Mr. Walker, will present this and receive your answer.

Truly yours,

STRONG & SHEPARD.

6. Q. What did you do in presenting the letter?

A. As I have stated I handed that letter to a gentleman; I asked him if he was a member of the firm of Duncan, Sherman and Company; he said he was; I don't remember whether he read the letter in my presence, or whether he made any answer; I only know I did not get the stock or the value of it.

7. Q. Did you receive any answer to the letter, or was any received by the attorneys of the complainant, so far as you know?

A. I am not aware of any.

ALDACE F. WALKER.

Subscribed and sworn to before me this 9th day of August, 1870.
THERON GEO. STRONG,
Notary Public N. Y. Co.

179 I hereby certify that the foregoing testimony of Benjamin Cartwright, Francis S. Conover, William B. Duncan, Samuel Jaudon, and Aldace F. Walker was taken before me by a stenographer on the 2nd, 4th, and 5th days of August, 1870, at my office, No. 90 Broadway, New York; that said testimony so taken was reduced to writing under my personal supervision; that the said witnesses were carefully examined and cautioned, and duly sworn to testify the truth, the whole truth, and nothing but the truth, before giving such testimony, and the said testimony, after being so reduced to writing, was carefully read by said witnesses, who thereupon each subscribed and swore to the same before me; that the said testimony was so taken in the presence of one of the solicitors for the complainant, Hon. T. R. Strong, and W. H. Arnoux, esq'r, one of the solicitors for the defendant The National City Bank, and Joseph Larocque, esq'r, one of the solicitors for the defendants William B. Duncan, David Duncan, and William Watts Sherman, pursuant to an order entered herein, on the 20th day of July, 1870, by consent of the parties by a stipulation of the respective solicitors, duly filed with the clerk of this court.

Dated New York, August 9th, 1870.

[SEAL.] THERON GEO. STRONG,
Notary Public N. Y. Co.

180 (Endorsed:) U. S. circuit court. Mary T. B. Jaudon, by her next friend, against Samuel Jaudon, William B. Duncan, David Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon. Deposition of witnesses. Strong & Shepard, solicitors for complainant, 90 Broadway, N. Y. Filed Aug. 17, 1870.

181 U. S. circuit court, southern district of New York.

MARY T. B. JAUDON, BY HER NEXT FRIEND,
vs.
WILLIAM B. DUNCAN ET AL.

We hereby waive all objection to the testimony of Aldace F. Walker in the above-entitled action, so far as the said objection relates to admission of secondary evidence of the contents of a letter containing a demand upon Duncan, Sherman & Co.; also, so far as said objection relates to the want of a proper notice being given to said Duncan, Sherman & Co. to produce the original of said letter.

BARLOW, LAROCQUE & MACFARLAND,
Att'ys for Def'ts Duncan, S. & Co.

SEPT. 26TH, 1870.

(Endorsed:) U. S. circuit court. Mary T. B. Jaudon vs. William B. Duncan et al. Stipulation. Strong & Shepard, sol'rs for compl't, 90 Broadway, N. Y.

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183 OFFICE OF THE DELAWARE & RARITAN CANAL,
AND OF THE CAMDEN & AMBOY RAILROAD
AND TRANSPORTATION COMPANIES,
Princeton, New Jersey, July 19th, 1866.

The stockholders of the above joint companies, and of the Philadel-

phia and Trenton Railroad Company, at this date, have the right, until September 1st, 1866, to subscribe at par for joint-stock not yet issued, in the proportion of one new share for four shares now held.

Twenty-five dollars on each new share to be paid on subscribing.

" " " " " " " " " " " March 1st, 1867.
" " " " " " " " " " " September 1st, 1867.
" " " " " " " " " " " March 1st, 1868.

Special receipts will be given for fractional parts of an installment, to be redeemed when presented, in sums of twenty-five ($25) dollars, by a receipt for an installment on a complete share.

Receipts for installments, except for fractional parts of a share, will draw their proportion of future dividends, the time of payment being considered.

A delay of thirty days in paying any installment will forfeit all previous payments and the rights hereby given.

RICHARD STOCKTON,
Treasurer.

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185 DELAWARE AND RARITAN CANAL AND
C. & A. RAILROAD & TRANSP'T. COMPANY,
Trenton, N. J., Oct. 5, 1870.

Messrs. STRONG & SHEPARD.

GENTLEMEN: In reply to your note of the 4th inst., I hereby certify that the statement given below is a true acc't of the rates of dividends paid by the Del. & Rar. Canal & C. & A. R. R. & Transp't Co's, upon the dates given:

August 1st, 1866, 5 %.
February 1867, 5 % on stock, $3\frac{1}{3}$ % on scrip.
August " 5 % " " $4\frac{1}{6}$ % " "
February 1868, 5 %.
August " 5 %.
February 1869, 5 %.
August " 5 %, with rights to subscribe for 15 % of new stock,
February 1870, 5 %. at par, upon the number of shares held
August " 5 %. July 15th—stock then worth about 120.

Your ob't serv't,

F. S. CONOVER,
Register & Transfer Agent.

Attest:
LEROY H. ANDERSON.

I send the enclosed circular that you may see how stockholders were allowed to subscribe for new stock in 1866, and to account for dividend on scrip in 1867. Mr. Stockton, the treasurer, is absent. If it is necessary that the certificate should come from him it can be sent in a day or two.

F. S. C.

186 (Endorsed:) Delaware and Raritan Canal Co. Oct. 5, 1870.

187 United States circuit court, southern district of New York.

MARY T. B. JAUDON
vs.
THE NATIONAL CITY BANK, WILLIAM B. DUNCAN, & others.

It is stipulated and agreed by and between the solicitors for the respective parties that, on the trial of this cause, the complainant may read in evidence the annexed certificate of F. S. Conover, register & transfer agent, an officer of the Delaware and Raritan Canal Company, &c., with like effect as if the said officer was sworn as a witness for the complainant on said trial and testified to the facts stated in said certificate, subject, however, to objection and exception for irrelevancy and immateriality by the defendants or any of them, in like manner and with like force as if made and taken on an oral examination of the said officer as a witness.

Also that, on said trial, the printed volumes of the reports of the State and national courts of Pennsylvania, and the statutes of that State printed, or volumes usually received as such, may be referred to for evidence of the laws of that State, so far as may be necessary, with like force and effect as if the same had been duly proved in the making of proofs in the cause.

BARLOW, LAROCQUE & MACFARLAND,
188 *Att'ys for De'ndants Duncan, Sherman & Co.*
MERRIHEW & ARNOUX,
Att'ys for Def't City Bank.

(Endorsed:) United States circuit court. Mary T. B. Jaudon against The National City Bank, W'm B. Duncan, & others. Stipulation. Strong & Shepard, attorneys for complainant, 90 Broadway, New York.

189 United States circuit court, southern district of New York.

MARY T. B. JAUDON, BY HER NEXT FRIEND,
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon.

Deposition and testimony taken on behalf of the plaintiff before a notary public in the city of New York, by consent of the parties, by a stipulation of the respective solicitors duly filed with the clerk of this court, and an order of the court duly entered thereupon on the 20th day of July, 1870.

Appearances.

For complainant, appeared Messrs. Strong & Shepard. For defendant, appeared Messrs. Bowdoin, Larocque & Barlow; & Merrihew & Arnoux.

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NEW YORK, *Tuesday Sept.* 20, 1870.

191 Mrs. MARY T. B. JAUDON, the complainant in the action, being produced, sworn, and examined as a witness, testifies as follows:

Direct examination by Mr. Strong:

1. Q. Where do you reside?
A. Philadelphia.
2. Q. Are you a resident of that city, and a citizen of the State of Pennsylvania, and have you been so for several years?
A. Yes, sir.
3. Q. Are you married; and if so, who is your husband?
A. I am married to Doctor C. B. Jaudon.
4. Q. Have you a separate estate?
A. Yes, sir.
5. Q. For your use and under your control, free from your husband?
A. Yes, sir.
6. Q. Have you such an estate to some extent independent of the matters in this litigation?
A. Yes, sir.
7. Q. Who was your father?
A. Commodore William Bainbridge.

192 8. Q. Where did he reside during his life?
A. He resided in Philadelphia.
9. Q. When did he die?
A. In July, 1833.
10. Q. At Philadelphia?
A. Yes, sir.
11. Q. Did he leave a will?
A. Yes, sir.
12. Q. Is that proved in the office of the register of wills, in Philadelphia?
A. Yes, sir.
(Paper produced.)
Exemplified copy will offered in evidence, and marked Pl'ff's Exhibit No. 1, Sept. 20, 1870.
13. Q. Are you the daughter referred to by the name of Mary T. Bainbridge, in the several clauses of the will?
A. Yes, sir.
14. Q. After the proof of the will, did the original trustees assume the duties of their trust, and act for any length of time?
A. Yes, sir; I forget exactly the number of years, but it was not very long.
15. Q. Who were the original trustees?
A. William Lynch and Hugh Calhoun, esq.
16. Q. Will you state whether proceedings were then taken for their discharge and the appointment of another trustee in their place?

193 A. Yes, sir.

(Complainant's counsel offers in evidence an exemplified copy of the proceedings, marked Complainant's Exhibit No. 2, September 20, 1870.)

17. Q. Since those proceedings, and the appointment of the def't Samuel Jaudon, has he acted as such trustee?
A. Yes, sir.
18. Q. Upon or after his appointment, did there come into his hands, as such trustee, any stock of the Delaware & Raritan Canal Co.?
A. Yes, sir.

19. Q. About how many shares?
A. 117.
20. Q. Do you now refer to the whole quantity of such stock that came into his hands, or only that which was subsequent' set apart to you?
A. I only refer to mine.
21. Q. State whether any 5-20 Government securities also came into his hands as such trustee?
A. Yes, sir.
22. Q. About what?
A. $5,600.
23. Q. Par value?
A. Yes, sir.
24. Q. Is your mother, named in the will, dead?
194 A. Yes, sir.
25. Q. When did she die?
A. She died in the winter of 1857.
26. Q. Upon her death did any division and separation of interests of the several persons interested in these trusts, sisters of yours, take place?
A. Yes, sir.
27. Q. State whether it was on that occasion that this number of shares of stock you have mentioned, and this amount of Government securities you have stated were set apart to you?
A. The Camden and Amboy stock.
28. Q. What do you mean by that?
A. The Delaware and Raritan; I had my fourth.
29. Q. Do you now refer to that description of stock on hand at your mother's death?
A. Yes, sir.
30. Q. You had your fourth of that?
A. Yes, sir.
31. Q. Beyond that did you have enough to make up the 117?
A. No; that made up what I had from her, my fourth, and what I previously had.
(Counsel for complainant refers to the clause of the will, numbered 15thly, and to the clause immediately following, numbered 1st,
195 directing the $28,000 to be invested, and reads that clause to the witness.)
32. Q. At the time of your mother's death, and the division which has been referred to, was this $28,000 on hand as a portion of the estate?
A. Yes, sir; it was invested principally in this Delaware & Raritan stock.
33. Q. That was on hand at the time?
A. Yes, sir.
34. Q. Was that embraced, and did it go, in the division between the sisters interested in the trust, and including yours, to which you have referred?
A. Yes, sir.
35. Q. Have you had any child, or children?
A. No, sir.
36. Q. Did you ever authorize or consent to a sale, or pledge, or other disposition of the investment in the Delaware and Raritan Canal Company's stock, which was assigned to you on the division referred to?
(Def'ts' counsel objects. Taken subject to objection.)

A. No, sir.

37. Q. Were you ever at any time consulted in reference to a sale or pledge, or other disposition of any of those stocks?

(Same objection.)

A. No, sir.

196 38. Q. Did you know of any sale or pledge, or other disposition of any of those stocks, before it had actually been made, as stated in the complaint?

(Same objection.)

A. No, sir.

39. Q. Did you then, or at any time thereafter, directly or indirectly, approve of it?

(Objected to. Taken subject to objection.)

A. No, sir.

40. Q. Was your consent to it ever asked or given?

(Objected to. Taken subject to objection.)

A. No, sir.

41. Q. When did you first know of any pledge or hypothecation of those stocks?

(Objected to. Taken subject to objection.)

A. I never knew of them at all.

42. Q. I refer now to the pledge or hypothecation to the def'ts Duncan, Sherman & Co., and to the National City Bank?

A. Yes; I did not know anything about it.

43. Q. Did you hear of it any time after it had been made; or at any time?

(Objected to. Taken subject to objection.)

A. No, sir; not until Mr. Jaudon acknowledged that he had pledged these stocks; that was the first information that I had that they were pledged.

44. Q. Was that before or after the stocks had been sold?

197 A. That was after, in December—the year after the stocks had been sold.

45. Q. Were you ever consulted, or did you ever give any consent in reference to the pledge or hypothecation to either of the defendants?

(Objected to. Taken subject to objection.)

A. No, sir.

46. Q. Up to what time did Samuel Jaudon, the trustee, pay the interest or annuities on the stock?

(Objected to. Taken subject to objection.)

A. February, 1868; and then there were $205 paid in August, 1868.

47. Q. Has any been paid since that time?

A. No, sir; not since.

48. Q. Did that payment of $205 satisfy the instalments?

A. It was on account of the August dividend.

49. Q. What was the amount?

A. The amount was $605. I received $205.

Cross-examination by Mr. MacFarland:

50. Q. I think there were four beneficiaries under the will of your father?

A. Yes, sir.

51. Q. Are the names of all of them in your mind? Be good enough to state them? It will save me the trouble of consulting the will.

52. A. My sister Mrs. Hayes; my sister Mrs. Lucy Ann Jaudon, of New York; my sister Mrs. Admiral Hoff, and myself.

198 53. Q. Of what did the trust estate consist at the time of your father's decease?

A. Well, sir, I believe it was principally in Pennsylvania fives, and there was Ohio loans, and some city stock of Philadelphia, and then a house in Philadelphia.

54. Q. The trust estate was never divided between the different beneficiaries until after your mother's decease, if I understand you?

A. A portion of it was; all except what my mother had during her life.

55. Q. The trust estate, with the exception of that in which your mother had a life interest, was divided, at about what time?

A. Well, it must have been divided very soon after my father's death.

56. Q. The original trustees acted about how long, do you think?

A. As far as my recollection goes, I think it was not more than a couple of years after father's death.

57. Q. Was there any change made in the investment before their resignation?

A. No, sir.

58. Q. What led them to resign the trust?

A. Well, they were old gentlemen, and one of them did not care about holding on. It was a voluntary thing on his part. The other was very far advanced in life, and he was not acceptable to us.

199 59. Q. The different beneficiaries desired to make a change in the nature of the investment, did they not, thinking it would be more to their advantage?

A. Well, sir, I do not remember anything about it, because the executors arranged all that.

60. Q. The executors were——

A. My two brothers-in-law. One was Mr. Ashbel G. Jaudon, who is deceased, and the other was Thomas Hayes, of Philadelphia.

61. Q. The matter as to the investment of the trust fund was left by the beneficiaries altogether in the hands of the executors, I understand you?

A. Yes, sir.

62. Q. Do you know when the first change in the investment of the funds was made—about what time?

A. Well, it may have been, perhaps, not longer than three years after my father's death. I cannot exactly, positively state.

63. Q. Do you remember how it came to be made?

A. I did not know anything except that the change was made by the executors, and was agreeable to ourselves—my sisters and myself. We were not consulted about it.

64. Q. The title to the trust fund, and to the property which was substituted from time to time, was always taken to the trustee, was it not—by the trustee, in his own name?

A. I suppose so.

200 (Complainant's counsel objects to the answer so far as suppositions are concerned.)

65. Q. You know it was so, don't you?

A. There were so few changes made that really I——

66. Q. Changes were, from time to time, made, were they not—changes in the investment were made from time to time?

A. Changes in the investment?

67. Q. In the investment of the trust funds I mean?

A. Well, there were some small changes made, but not the principal—

not the bulk. As stocks would fall due of course they had to be re-invested, but the principal part of the property was never changed.

68. Q. You don't mean that it was never changed from the original investment left by your father?

A. No, sir. I mean from investments in Delaware and Raritan.

69. Q. You mean it was never changed but once?

A. Yes, sir.

70. Q. By Mr. STRONG: That was in Delaware and Raritan?

A. Yes; placed in Delaware and Raritan.

71. Q. The bulk of the investment was never changed but once?

A. Yes; never but once.

72. Q. I understand you to say that that change was perfectly agreeable to the beneficiaries?

201 A. That one?

73. Q. Yes.

A. Yes, sir.

74. Q. As was, also, the other changes that were made in the investment?

A. I suppose so. (Complainant's counsel objects to a supposition on the part of the witness.) I believe so.

75. Q. There was never any fault made, or any fault found, with any of those investments on your part, was there?

A. No, sir.

76. Q. Or on the part of any of the others that you know of?

A. No, sir.

Cross-examination by Mr. Arnoux:

77. Q. Do you know whether any part of this Delaware & Raritan Canal Company's stock belonged to your father's estate; whether your father owned it in his lifetime?

A. No, sir.

78. Q. None of it belonged to him?

A. No.

79. Q. Was there in the hands of William Lynch and Hugh Calhoun, the original trustees under the will, any of this stock?

A. No, sir.

80. Q. Do you know when the stock came into the hands of Samuel Jaudon?

A. Well, after he took the trust.

81. Q. How long after his appointment?

202 A. I scarcely remember, because that matter was altogether arranged by the executors of the estate. I suppose it was not very long; it might be two or three years.

82. Q. Do you know of what stock the moneys that went into this Delaware & Raritan Company's stock was the proceeds?

A. Well, of the Pennsylvania stock.

83. Q. Pennsylvania five per cents?

A. Pennsylvania five per cents.

84. Q. Do you know how much Delaware & Raritan stock was originally bought?

A. I don't think I could answer that, exactly.

85. Q. Do you know how large an amount the Pennsylvania fives were sold?

A. I really don't think I could give you the exact amount.

86. Q. As near as you recollect?

A. I don't think that I could tell. They attended to it. I think I

have a memorandum that I found in some old letter, of the number of shares.

87. Q. Was it about $40,000?

A. I cannot say positively.

88. Q. As near as you recollect what was the amount?

A. I am not qualified to give you any answer.

89. Q. Did the amount exceed $30,000?

A. Well, I suppose it must.

90. Q. Was the whole of that money invested in this Delaware & Raritan Canal stock?

203 A. I think the whole of the Pennsylvania fives were.

91. Q. Do you remember how much your share of the income was under the will, from the investment as it originally stood?

A. You mean my share of the income from the Pennsylvania fives?

92. Q. Yes.

A. Well, really, I have forgotten; I do not exactly remember.

93. Q. Did the change of investment increase the amount of your income?

A. Well, the Camden & Amboy was very high—bought in very high.

94. Q. Well, just answer that, if you please.

A. Yes; it did moderately.

95. Q. Can you state how much it increased?

A. Well, that depended upon the dividend paid; it did increase, but it varied so much. You mean to say the average?

96. Q. Yes.

A. Well, from that portion I suppose it was $1,200 a year.

97. Q. By Mr. STRONG. The difference?

A. Oh, no; not the difference.

98. Q. You suppose that the whole amount that you received then from the dividend of the Delaware & Raritan Canal stock was about $1,200 a year.

A. Yes; but that was not $1,200 over the other.

99. Q. That was the amount you received?

A. Yes, sir.

204 100. Q. About how much was that increase over the amount that you received from the Pennsylvania fives?

(Objected to as irrelevant and immaterial; taken subject to objection.)

A. I don't think the increase was over $300.

101. Q. You spoke, on your direct examination, of your stock; you said, "I had my fourth." You mean you had the income of one-quarter of the stock?

A. Yes. I never had the stock.

102. Q. That always remained in the hands of Mr. Jaudon?

A. Yes, sir.

103. Q. And the liability, so far as you know, was in him?

A. Yes, sir.

(Complainant's counsel objects to the opinion of the witness.)

104. Q. How much additional stock of the Delaware & Raritan Canal Company went into Mr. Jaudon's hands for you, on the death of your mother?

A. Well, I had 117 shares.

105. Q. Altogether?

A. Altogether.

106. Q. You have told us that the difference between 93 and——

A. Shares, and 117.

107. Q. Then the amount originally that he held for your benefit was 93?

205 A. Yes, sir.

108. Q. And on the death of your mother it was increased, by the dividend from her estate, to 117?

A. Yes, sir; that was not the dividend, it was the——

109. Q. Additional?

A. Yes, sir; the additional.

110. Q. Did you know, before the purchase of this Delaware & Raritan Canal stock, of an intention to purchase it?

A. I certainly knew of it; but it was all arranged by the executors.

111. Q. I ask, before the purchase was made?

A. No, sir; I did not. I did not know anything about it until after it was done.

112. Q. And you regularly received the dividends from Mr. Jaudon on this stock until February, 1868?

A. Yes, sir.

113. Q. Did you ever, to your knowledge, see the shares or certificates of the shares of this stock?

A. No, sir.

114. Q. Was the investment of the $28,000 in Delaware & Raritan Canal stock in addition to the amount realized from the sale of the Pennsylvania fives?

A. No; I believe it was all in one.

115. Q. Was that a part?

A. That was a part of the sale of the Pennsylvania fives?

206 116. Q. Do you remember whether, and, if so, what stocks were sold in addition to the Pennsylvania fives for the purchase of this Delaware and Raritan Canal stock?

A. I don't think any.

117. Q. Nothing else?

A. I expect they were all one mass.

118. Q. What other stocks were sold and changed afterwards?

A. There were no other stocks sold excepting——

119. Q. Or the proceeds of what stocks?

A. The proceeds—sometimes when loans were paid off and stocks bought.

120. Q. Do you know what purchases were made?

A. Only those—the five-twenties.

121. Q. Was that the only one?

A. And seven-thirties.

122. Q. The only stocks that were bought, then, were those Delaware and Raritan Canal stocks?

A. Yes, sir.

123. Q. So far as you recollect?

A. Yes, sir.

124. Q. Had the trustees originally appointed, to your knowledge, ever refused to change the investment of the estate?

A. No, sir; never asked to do it.

125. Q. You don't know anything about it?

A. I don't know anything about it. I don't think they were.

207 126. Q. How soon, to the best of your recollection, after the purchase of this Delaware and Raritan Canal stock, were you informed of it?

A. Well, I suppose I must have known immediately—brothers told me everything.

127. Q. But you think it was not spoken of in advance to you?
A. Oh, no.
128. Q. But on or at the time the purchase was made?
A. Yes. I did not know; they arranged that themselves.
129. Q. You suppose you were informed of it at the time the purchase was made?
A. Yes, sir; I suppose so.
(Complainant's counsel objects to the supposition of the witness.)

Re-direct examination by Mr. Strong:

130. Q. Have you any recollection that you were informed of the purchase of this stock before it had been consummated?
A. No.
131. Q. Were you ever consulted with reference to it?
A. No, sir.
132. Q. The bulk of the investment of the estate of your father, after the substitution of the Delaware and Raritan Canal Company's stock for the Pennsylvania fives, was in the Delaware and Raritan Canal Company's stock?
208 A. Yes, sir.
133. Q. Do you know of any investments in any other securities, until after the death of your mother, and the sale of the house and lot, and the purchase of the Government securities?
A. Well, there was a Philadelphia City loan, and some Ohio loan.
134. Q. Are those all you know of?
A. Yes; those are all I can recollect.
135. Q. Except the ones you have mentioned?
A. Yes, sir; and the house. I knew very little about those matters; they were all arranged by the executors.
136. Q. From what did the funds arise that were invested in the Philadelphia City loans?
137. A. I do not know what they arose from; they were a portion of father's estate.
138. Q. Did they belong to your father's estate at the time of his death?
A. Yes, sir.
139. Q. What amount was it?
A. I really cannot tell.
140. Q. Was it any considerable amount?
A. I really don't remember.
141. Q. What became of those investments?
A. Well, there was some portion of them put into some stock that I have spoken of—some coal stock—the Dauphin. I do not recollect what proportion of them.
209 142. Q. And what was done with the rest?
A. Well, the rest—I suppose it must have been all put in, because we lost considerable, I remember, by an injudicious investment.
143. Q. What became of that coal stock?
A. It vanished, I suppose. But those matters were arranged altogether by the executors, and I have no recollection of it whatever, except a mere general one.
144. Q. (By Mr. Arnoux.) Except a general assent?
A. Well, I was not consulted.
145. Q. Did you give any consent to it at all?
A. For the investment of those stocks?
146. Q. Yes.

A. Well, I suppose I must.

147. Q. Do you recollect of any?

A. I do not remember. I have only one recollection of that Dauphin investment. That is the one I spoke of. It was an injudicious one. It was supposod to be a good one at the time.

148. Q. Were you consulted in regard to making it?

A. No, sir.

149. Q. Did you give or express any approbation of it before it was made?

A. On this special stock?

150. Q. Did you give any consent to it?

A. Well, I suppose I must.

151. Q. Have you any recollection of giving any assent to it?

210 A. Yes; of course, I remember. But I don't know that that particular stock had anything to do with——

152. Q. With what?

A. Well, it was a portion of my father's estate.

153. Q. Who made that investment?

A. Well, I suppose Mr. Jaudon, with the consent of the executors.

154. Q. Do you know about it?

A. I only know that it was made with the approbation and consent of the executors.

155. Q. You know that?

A. Yes, sir.

156. Q. Now, how much of that stock was there?

A. Well, belonging to my father's estate, I don't think there was more than four thousand.

157. Q. Was any more invested in that stock?

A. Well, there was some that belonged to myself.

158. Q. How much?

A. I suppose about four thousand.

159. Q. In addition to that which belonged to your father's estate?

A. Yes, sir.

160. Q. Was that invested in this Dauphin coal stock?

A. Yes, sir.

161. Q. Was that lost?

A. Yes, sir.

211 162. Q. Was your interest in that stock in addition to the 117 shares of Delaware & Raritan canal stock that has been mentioned?

A. You mean that Dauphin?

163. Q. Yes.

A. Yes; well, that formed a portion, you know, of my father's estate.

164. Q. But beyond that did you have this 117 shares?

A. Oh, no. That had nothing to do with the other. It was a separate thing.

165. Q. You have mentioned that at the death of your mother, and on the division which took place, you had 117 shares of the Delaware & Raritan Canal Company's stock?

A. Yes, sir.

166. Q. Is that all you had of that stock at that time?

A. That was all I had. That was including my own, you know, and my mother's.

167. Q. Reflect upon it, and see whether that was the whole. What did you have before?

A. You mean what I had before in the——

168. Q. What you had before your *your* mother's death?

A. I had the 93 shares.

169. Q. How many were assigned to you on the division of this $28,000 on the death of your mother?

A. There were 28.

170. Q. That would make 121?

A. Yes; 121.

212 171. Q. What became of the four shares of that stock above the 117?

A. It was sold by Mr. Jaudon in Philadelphia, each share separately.

172. Q. With your knowledge and with your consent?

A. No, sir; I knew nothing about it, except from the books of the Camden and Amboy Company.

173. Q. Did you receive any portion of the proceeds?

A. No, sir.

174. Q. What other stock belonged to your father's estate, if any?

A. Well, I know no other, except the bulk of his estate was in Pennsylvania fives.

175. Q. Subsequently converted——

A. Into Delaware & Raritan. Then he owned a house in Philadelphia, and he had stocks in the Ohio loans, and, I think in city loans.

176. Q. By Mr. Arnoux. That is Philadelphia City?

A. Yes; Philadelphia City; but I cannot recollect the exact amounts.

177. Q. What became of those stocks?

A. Well, they paid off; and then some portion was put into this Dauphin, I suppose, and some into Government securities.

178. Q. Did your father also leave some personal property?

A. No; nothing more than testimonials he had received from

213 this city in the shape of gold snuff-boxes, letters, &c.

179. Q. Are the changes in investments which you have mentioned, that is, from Pennsylvania fives into Delaware and Raritan Canal Company's stock, the Philadelphia & Ohio stock into the Dauphin stock, and the purchase of the 5,600 Government securities—are those all the investments of which you have any knowledge?

A. Yes; they are. The $56,000 was partly the proceeds of the sale of the house.

180. Q. That is the purchase of Government securities?

A. Yes, sir; the purchase of Government securities.

181. Q. When did you first learn, if at all, that Mr. Samuel Jaudon had purchased, with trust funds belonging to you, any coal stock known as Broad Top?

(Defendant's counsel objects. Taken subject to objection.)

A. In December, 1868.

182. Q. Were you ever consulted in regard to such use of your funds and any investment in them?

(Defendant's counsel objects. Taken subject to objection.)

A. No, sir.

183. Q. Did you at any time express your approbation of it?

(Defendant's counsel objects. Taken subject to objection.)

214 A. I did not know any thing about it.

184. Q. When did you first learn of it, in reference to the time of learning that your Delaware & Raritan canal stock had been sold by Duncan, Sherman & Co., and by the National City Bank?

(Defendant's counsel objects. Taken subject to objection.)

A. At the same time.

185. Q. On the same occasion?

A. Yes, sir.

186. Q. That was the first you knew of it?

A. Yes, sir.

Re-cross-examination by Mr. Arnoux:

187. Q. When was the house and real estate sold?

A. Well, sir, it was sold, I think, two or three years after mother's death.

188. Q. How much did it realize?

A. Ten thousand dollars. It was sold the very first year of the war, in June, 1861, as near as I can remember.

189. Q. What was done with the funds realized from the sale of the house before they were put into Government securities?

A. Well, I think they were placed in Pennsylvania stock.

190. Q. And continued in Pennsylvania bonds until they were sold and converted into Governments?

215 A. Yes, sir.

191. Q. When were the four shares that you speak of of the Delaware and Raritan sold?

A. February, 1868; sold separately.

192. Q. When was it that the Dauphin stock was bought?

A. I do not recollect. I could not give you the date.

193. Q. As nearly as you can?

A. It was some four or five years before mother's death.

194. Q. You say your mother died in 1857. That would be in 1852 or 1853?

A. I cannot say positively, but I know it was before her death.

195. Q. By whom was the Dauphin stock bought?

A. It must have been by Mr. Jaudon.

196. Q. Did he also buy the four thousand which you individually invested in that stock?

A. Yes, sir.

197. Q. Did he buy it at the same time that he bought the other four thousand.

A. Yes; it must have been all invested at the same time.

198. Q. Did you place your four thousand dollars in his hands to make the purchase of the stock?

(Objected to as immaterial and irrelevant by complainant's
216 counsel. Taken subject to objection.)

A. I do not recollect about it.

199. Q. What is your best recollection on the subject?

A. I cannot think.

200. Q. Did he retain the certificate of the shares of the four thousand dollars of your money with the other certificate?

A. No.

201. Q. He gave the certificate to you?

A. Yes; what was my own.

202. Q. But what was the trust fund he retained?

A. He retained that of course.

203. Q. Did Mr. Jaudon receive directions from you individually to make these purchases, or from the executors?

A. I do not think he received any from me; it must have been through the executors.

204. Q. Did he purchase more of this Dauphin stock than went to your share?

A. Not that I know of; no.

205. Q. I mean with the trust funds?

A. Oh, with the trust funds? Well, he purchased the same proportion with my sisters' and mother's, I suppose. It was before her death.

206. Q. What was this Dauphin company—a Pennsylvania coal company?

A. Yes, sir.

217 207. Q. Do you know where the lands of the company are located?

(Objected to as immaterial by complainant's counsel. Taken subject to objection.

A. It is in the vicinity of Harrisburgh.

Adjourned to Thursday, September 22d, 1870, at 10 o'clock.

Further adjourned, on appearance of respective counsel, to Thursday, September 29th, 1870, at 12 m.

Court. Before a notary.

JAUDON } v. JAUDON.

SEPTEMBER 29, 1870.

Parties met pursuant to adjournment.

Appearances—

Mr. Strong for pl'ff.

" McFarland " def't.

" Macrae (for Mr. Arnoux) for the bank.

Mary T. B. Jaudon—re-cross examination continued by Mr. Macrae:

208. Q. Did you know of the purchase of the Dauphin coal stock before it was made?

A. No, sir.

218 209. Q. When did you ratify the purchase?

(Objected to as assuming what does not appear in proof. Taken subject to objection.)

A. I cannot tell you; I don't remember.

210. Q. How long after the ratification did the stock become worthless?

(Objected to as above. Taken subject to objection.)

A. I don't know.

Re-direct examination by Mr. Strong:

211. Q. (Counsel reads to the witness the 61st question and the answer.) Explain what you mean by saying, in answer to the 61st question, that the beneficiaries left the matter, as to the investment of the trust funds, altogether in the hands of the executors?

A. Well, I presume they had the settlement of the estate, and that they would do it legally and properly. I was not consulted about it. That is all I mean.

212. Q. What was the first change in the investment of the trust funds?

A. The Pennsylvania fives were sold.

213. Q. And the proceeds invested in what?

A. The Delaware & Raritan Canal Company's stock.

219 214. Q. (Counsel reads to the witness the 62 & 63d questions and answers.) Explain what you mean by saying, in answer to the 63d question, that it was made by the executors, and was agreeable to your sisters and yourself?

A. Well, I have nothing to say, except that it was agre'able; but I was not consulted about it. It was done by the executors in the settlement of the estate.

215. Q. Did you have any communication with them about it until after it was made?

A. No, sir. I knew nothing about it whatever.

216. Q. Did you have any communication with them before it was made?

A. No, sir.

217. Q. What was the next change in the investment of the trust funds, according to your recollection?

A. I don't know, except the Dauphin stock.

218. Q. Do you know from what funds the purchase of the Dauphin stock was made?

A. I really cannot tell, except it may have been some Ohio loans and city loans of Philadelphia.

219. Q. That had been previously paid in?

220 A. That was paid off. The executors settled all that. I knew nothing about it.

220. Q. Was the purchase of the Dauphin stock for the benefit of all the beneficiaries?

A. Yes, sir.

221. Q. I understand you to say that you invested, through Mr. Samuel Jaudon, some funds of your own in that stock at the same time?

A. Yes, sir; about $4,000, as far as I recollect.

222. Q. Was any other investment of the trust funds made, to your knowledge, until after your mother's death?

A. No, sir.

223. Q. And what other investments were made?

A. I don't know of any, except after the house was sold.

224. Q. And that was in Governments?

A. Yes, sir.

225. Q. Was that in 7-30s, and converted into 5-20s?

A. Yes, sir.

226. Q. Explain what you mean by saying, in answer to the 74 question, that the other changes that were made in the trust funds, other than in the Delaware and Raritan Canal Company, you supposed and believed were agreeable to the beneficiaries?

A. Yes, sir; I supposed so.

221 227. Q. What do you mean by saying that?

A. I never heard anything to the contrary.

228. Q. That is all?

A. Yes, sir; that is all.

229. Q. What changes do you refer to in that answer?

A. I referred to all of them; the Dauphin and the sale of the house or the conversion of the proceeds of the sale of the house into Government securities, that is all.

230. Q. Those are the only changes you refer to?

A. Those are the only changes.

231. Q. In your answer to the 75th and 76th questions you say that no fault was found by you or the others with those other investments—what do you mean by those other investments?

A. Well, the investment of the Dauphin and the Governments.

232. Q. State whether you was consulted in regard to those investments, or expressed any opinion or feeling, in any way, in regard to them, except as you have mentioned in reference to the Dauphin?

A. No, sir.

233. Q. Was the subject of a change of the investment, in the Delaware and Raritan Canal Company stock, after the investment had been made, agitated or contemplated at any time?

A. No, sir.

222 234. Q. What was the average of the dividends on the Delaware and Raritan Canal stock, so far as you recollect?

A. It might have been 10 per cent. It varied; sometimes more, sometimes less.

235. Q. State whether the dividends were increasing in amount or otherwise, at the time these stocks were sold out by Duncan, Sherman & Co. and the City National Bank?

A. No; They were about the same.

236. Q. You have mentioned that these Delaware and Raritan Canal Company's stocks were purchased ——

A. At a very high rate.

237. Q. What is your recollection with regard to the rate?

A. I cannot remember positively except in a general way; the only way I could judge was unless they paid very high dividends. I didn't get very much more than I did out of the Pennsylvania fives and I infer'ed from that they were bought very high.

238. Q. Will you give an idea about what you thought they were bought at?

(Objected to as irrelevant and inadmissible. Taken subject to objection.)

A. I expect about 135.

223 Cross-examined by Mr. McFarland:

239. Q. Before the change of the investment, from the Pennsylvania stock to the Delaware and Raritan stock, did you have no conversation with the executors about it?

A. No, sir.

240. Q. Was the subject of that change never talked of between you and the executors?

A. No, sir.

241. Q. Or any one else before it was made?

A. No, sir.

242. Q. Do you remember whether the original trustees, who resigned, were requested to make that change of the investment.

A. No, sir; I didn't know anything about it.

243. Q. When was this investment in Dauphin coal stock made?

A. I don't remember.

244 Q. About what time?

A. I can't remember.

245. Q. Can you give me some idea of the year or about how many years ago?

A. No, sir; I can't.

246. Q. Whether it was one or ten?

A. I really can't remember; it was a short time before my mother's death.

247. Q. When did your mother die?

A. It was in '57.

224 248. Q. You have said, I think, that the trustee, Mr. Jaudon, invested some of your own separate estate in that stock at your request?

A. I don't think he invested in the Dauphin. I think Ashbel G. Jau-

don invested that—my own particular stock. I think it was my brother-in-law, Ashbel G. Jaudon; it might have been Mr. Jaudon, I can't remember which.

249. Q. That investment was made at your request?

A. Yes, sir.

250. Q. Was the investment of the trust fund made before or after the investment of your own fund?

A. I suppose about the same time.

251. Q. Did you know of it about the time it was made—the investment of the trust fund?

A. I didn't know of it until after it was made.

252. Q. About how long after?

A. I suppose I knew it as soon as I got the dividend.

(The counsel objects to the supposition.)

253. Q. When you received the dividends you knew, of course?

A. Of course; I gave receipts for the dividends.

254. Q. Did you make any objection to that investment?

225 A. No, sir.

MARY T. B. JAUDON.

Sworn to, before me, this 29th day of September, 1870

THERON GEO. STRONG,

Notary Public N. Y. Co.

I hereby certify that the foregoing testimony of Mary T. B. Jaudon was taken before me by a stenographer on the 20th and 29th days of September, 1870, at my office, No. 90, Broadway, New York; that said testimony, so taken, was reduced to writing under my personal supervision; that the said witness was carefully examined and cautioned, and duly sworn, to testify the truth, the whole truth, and nothing but the truth, before giving such testimony, and the said testimony, after being so reduced to writing, was carefully read by said witness who thereupon subscribed and swore to the same before me; that the said testimony was taken in the presence of one of the solicitors for the complainant, Hon. T. R. Strong, and W. H. Arnoux, esq'r., one of the solicitors for the defendant The National City Bank, and W. W. Macfarland, esq'r, of counsel for defendants William B. Duncan, David Duncan, and William Watts Sherman, pursuant to an order entered herein on the 20th

226 day of July, 1870, by consent of the parties by a stipulation of the respective solicitors, duly filed with the clerk of this court.

Dated New York, September 29, 1870.

[L. S.] THERON GEO. STRONG,

Notary Public N. Y. Co.

227 I hereby certify that during the examination and testimony, hereto annexed, of the complainant herein, the complainant's counsel put in evidence an exemplified copy of the last will and testament of William Bainbridge, and marked Exhibit No. 1; also an exemplified copy of the proceedings in the court of common pleas, in Philadelphia, to discharge the original trustees under the will of William Bainbridge, and for the appointment of another trustee and proceedings relating thereto, marked Ex. No. 2, which are hereby duly annexed to the complaint and hereto, and are certified by me.

Dated New York, September 29, 1870.

[L. S.] THERON GEO. STRONG.

228

229 In the name of God, amen. I, William Bainbridge, of the United States Navy, now residing in the city of Philadelphia, State of Pennsylvania, being of sound mind, do make this instrument to be my last will and testament, to wit:

First. I do hereby appoint my trusty friends William Lynch, Hugh Calhoun, Hartman Kuhn, Samuel P. Whetherill, and my son-in-law, Thomas Hayes, all of the city of Philadelphia, State of Pennsylvania, to be my executors of this my last will and testament.

Secondly. Within one month after my decease, I direct all my debts, which are but few, to be paid.

Thirdly. I bequeath unto my beloved wife, Susan Bainbridge, all my household furniture, including bed and bedding, during her natural life, and on her demise to be equally divided between my daughters, Susan P. Hayes, Mary T. Bainbridge, Lucy Ann Bainbridge, and Louisa Alexina W. Bainbridge, share and share alike.

Fourthly. I do direct that all my wines, which I may die possessed of, be equally divided between my beloved wife, Susan Bainbridge, and my aforesaid-named daughters, share and share alike.

Fifthly. The medal, voted to me by Congress, I bequeath to my beloved wife, Susan Bainbridge, during her natural life, on her de-
230 mise to be handed down to my eldest surviving daughter, and on her demise, in succession, to my next oldest surviving daughter, and on the demise of all my daughters, then to be given to my oldest grandson living; if there be no grandson, it is my will that it go in succession to my oldest granddaughter living, in the same manner as before directed to my daughters. The urn, presented to me by the citizens of Philadelphia, for the capture of the British frigate Java, I bequeath it in the same manner as I have done in the medal voted to me by Congress; and the remaining six pieces of silver plate, presented to me by the citizens of Philadelphia, to be divided between my daughters aforenamed, in the manner that their mother Susan Bainbridge may select, or, in case of her demise, by lot.

Sixthly. I bequeath to my grandson, William B. Hayes, my sword which was presented to me by General Hyslop. To second eldest grandson, by either of my daughters, my Damascus Mamaluke sword, presented to me by my highly esteemed friend Sir James Wylee, of Russia. My pistols I give to my third eldest grandson by either of my daughters, and my doubled-barrel gun I give to my fourth eldest grandson by either of my daughters.

Seventhly. I bequeath to my neice Cornelia Bainbridge, two hun-
231 dred dollars, to be paid to her within one year after my death.

Eighthly. I bequeath to Julia Dowling, now Mrs. Turner, of Charlestown, Massachusetts, one hundred dollars, to be paid to her within six months after my decease.

Ninthly. The gold snuff-box, presented to me by the city of New York with the freedom of the city, I bequeath to my daughter Susan P. Hayes, and on her demise, I request it to be given to her oldest surviving son, and if no son, to her oldest surviving daughter. The gold snuff-box, presented to me by the city of Albany with the freedom of that city, I bequeath to my daughter Mary T. Bainbridge, and on her demise, I request it to be given to her oldest surviving son, and if no son, to her oldest surviving daughter. The snuff-box with the likeness of the late Emperor Alexander, of Russia, I bequeath to my daughter Lucy Ann Bainbridge, and request, on her demise, it be given to her oldest surviving son, and if no son, to her oldest surviving daughter. The snuff-box with the likeness of the great Napoleon, I bequeath to my

such proof of reputation of a beginning corner. The matter being submitted to the court the objection was sustained, and refused to let the defendant prove the reputation of the neighborhood as to said corner at the present day, unless such reputation was traditional in its character, having passed down from those who were acquainted with the tree at an early day to the present time, or that the information as to such reputation was derived from ancient sources, or from persons who had peculiar means of knowing what the reputation of the tree was at an early day. But the court permitted the defendant to prove that the occupants of the Laidley lot No. 1, and of Mason's 927 acre tract, and those under whom they held, claimed the said poplar as the true corner of Laidley survey No. 1 and Mason's 929 acre tract. To the above opinion of the court, rejecting recent reputation as evidence, the plaintiffs excepted

The plaintiffs insist that there is no error in the above ruling of which the defendant can complain. The plaintiffs refer to the following authorities to sustain this opinion: 1st Starkie on Evidence, Sec. 34, Page 54, and extending to page 62.

The fifth bill of exceptions, beginning at page 78 and ending at page 91, is for refusing to allow a tax deed, made by the recorder Knight, of the county of Doddridge, to John S. Hoffman, to go as evidence to the jury. (See deed, pages 89 and 90.) It appears by this deed that the land in controversy had been returned delinquent in Doddridge county, Virginia, for the non-payment of the taxes thereon for the year 1857, in the name of Uriah Thompson, one of the plaintiffs. That under the laws of Virginia, ch. 37, of the code of Virginia, this land was sold in October, 1860, for the delinquent taxes of 1857 aforesaid. By chapter 37 aforesaid, two years were allowed for redemption, and after that, under sections 15 and 16 of that chapter, if not redeemed, the purchaser was required to have a survey of the land made and reported to the court which court, on examination, could approve it, and order the survey to be recorded. Thereupon the clerk was bound to make the deed in conformity to the survey so ordered to be recorded by the court. As appears by the deed, no survey

was made and reported to the court until the 24th of March, 1866, which survey the judge of Doddridge county then ordered to be recorded. In 1861, what was called the restored government of Virginia was established, and was continued until the 20th of June, 1863, when the government of West Virginia was established and organized. It seems by the subsequent legislation of West Virginia, she overlooked the taxes due Virginia as well as the purchasers of lands for taxes at the sales of 1860. For, by an act of her legislature passed in February, 1866, (session acts, page 81,) she provided a law for future sales, and provided for deeds for all sales made in 1865, and for all sales thereafter to be made. That act repeals the entire chapter of the code of Virginia by section 32, page 91. Section 33, page 92, provides for redemption as well as for deeds for lands sold in 1865, but repeals the old law, (chapter 37 of the code,) by which alone deeds could be made for sales made in 1860; so that, when the rejected deed of Knight was made to Hoffman, when the survey made by Maxwell and reported to the court by him, on the 24th day of March, 1866, and when the order of the court that it should be recorded was made by the judge, the law under which they all acted was repealed, and all that was done was therefore null and void. So the court properly rejected the deed. Smith's Com'ts., page 887, sections 765, 6 and 7.

The 6th and last exception is to two instructions, which were asked for by the jury after they had retired.

The court gave three instructions, but the two last were the subject of exception, found in page 97, in these words:

"2d. And if they further believe that the plaintiffs, or those under whom they claim, took charge of the lands within the grants to Jabez Bacon in 1817, and exercised authority over them, and that in 1826 they took actual possession of the same, and have so continued in possession of the same up to the institution of this suit, claiming them as their own under the Bacon grants and the deed to Peter Smith, paying all taxes duly assessed and charged against them on such lands, and all taxes that ought to have been assessed and charged against them, then the Bacon lands (if) forfeited as aforesaid to the Commonwealth, became and were actually invested in

the plaintiffs, or those under whom they claim, in October, 1834, under the act of 1832. But if the taxes assessed and due upon the lands against Smith do not amount to ten dollars, they are released by the act of 1832.

"3d. That if the jury believe from the evidence that the land in controversy was covered by grants to John Reed as well as by grants to Jabez Bacon, and that the grants to Reed were the oldest, and that under the act of 1835 they became forfeited for non-entry, and that said forfeiture was absolute in November, 1836; that the plaintiffs were the *bona fide* occupants of the land in controversy, or any part thereof, claiming title to the same, and that they have paid all taxes duly assessed, charged or chargeable against them, from the time when they acquired their title thereto; that the lands in controversy so forfeited in the name of John Reed, under the act of 1835, became transferred and absolutely vested in plaintiffs, or those under whom they claim, and that if the taxes charged against Peter Smith on the Bacon lands before 1832, were delinquent for less than ten dollars, they were released by law."

To these instructions the defendants excepted At the close of the exceptions the court adds: "And the evidence set forth in defendant's other bills of exceptions is by the court made a part of this, and therewith his bill is so signed, sealed, and made a part of the record."

It is contended that these instructions, if not literally, are substantially in conformity to law. (Supplement to Rev. Code of Va., 349, sections 8, 9, 10; same, 357, section 2; session act of 1835, page 12, section 3; acts generally of Va. from 1831 to 1849, when the code was adopted.)

The original brief presents the legal questions which arose in the cause, and which are to be reviewed by this court in the order they were presented in the court below.

The 1st bill of exceptions is to the opinion of the court allowing the deposition of W. Underwood to be read. It is insisted that the reasons given by the judge for this opinion are sufficient to sustain it.

It is, however, urged by the appellants that the words set out in the opinion of the court, and as part thereof, to-wit: "*as shown by the deposition*," applies to all the facts recited in

the opinion of the court by force of which the court over-ruled the motion to reject the deposition, and so qualifies the reasons given for the admission of the deposition as to make them valueless for that purpose. The point of the objection is that these words show that the facts which appeared to the court were derived from the deposition and not from evidence aliundi. The words "as shown by the deposition," can not be understood as applying to any fact appearing to the court which is not found in the deposition; all that is found in the deposition is that Caleb Boggess was present as counsel of Defendant; and that the witness was cross-examined by defendant. Now the court asserts that it appeared to it that "one of the counsel of defendant had accepted notice for taking said deposition, and that same counsel had appeared at the taking thereof, and cross examined the witness. But it does not appear by the deposition that any counsel had accepted notice and that the same counsel had appeared at the taking of it and had cross-examined the witness. All that appears by the deposition is that Caleb Boggess was present and that defendant had cross-examined, &c. It must therefore have appeared to the court by evidence aliundi that the notice was accepted by counsel, that the same counsel appeared at the taking thereof, and that the same counsel cross examined the witness and that the defendant did not cross-examine as shown by the deposition. The reasons given by the court for overruling the motion to exclude the deposition must therefore stand as unaffected by the words "as shown, &c." These words were thrown in as merely accumulative evidence, and as corroborative, to the extent of the facts, shown by the deposition, and in aid of the facts stated in the opinion, which had been derived from testimony other than the deposition.

It was then ascertained and declared by the court upon evidence before it, and not derived from the deposition, that the counsel of defendant accepted the notice to take it and cross-examined the witness and joined therefore in taking the deposition; that the deposition was in the case more than a year before the trial, and that no exception was taken to it before the trial; that the witness was an old man when his deposition was taken, and actually died before the trial, and

no exceptions, verbal or written were taken, before the deposition was offered in evidence to the jury. Under this state of fact every objection to the want of antecedent proceedings, in law, were waived, and where necessary consent and agreement will be presumed. This is fully established by the authorities referred to in the original brief.

The case referred to by defendant of Unis & Co., vs Charton, 13th Gratton. and the case Blinco vs Berkly, 1st Call, are alike in principle. In these cases there was neither notice or commission for taking the deposition, and the only evidence of an appearance was in the deposition. If it had appeared aliundi, that the party cross examined the witness, or had received notice of the taking, or that other equivalent evidence was before the court, waiver of objections would have been presumed. It may be urged by defendant that the above view of the case is technical, but it should be recoilected that the objections to the deposition are technical and made after the death of the witness, and probably suggested by his death. Under all the circumstances every reasonable presumption and inference should be allowed by the court to sustain the deposition.

The defendant has prepared a second brief in this case. In pages 53 and 54 there are copies of portions of the act of the legislature of West Va., and a portion of the constitution of the State of West Va., and intended to show a more limited jurisdiction of a justice of the peace than was given by the constitution and laws of Va.. It will be borne in mind that the constitution of West Va., continued the powers and duties of the officers of the old State until their successors were elected and qualified. See sect. 14 of Schedule to the Constitution of West Va., published in the Code of West Va. The constitution of West Va, went into effect June 20th, 1863. The 1st Legislature in the fall and winter of 1863-4. Provision had to be made for laying off townships in the several counties in the State; when laid off elections had to be made and returns thereof, and officers qualified, until which time the justices of the old State continued in office. The deposition was taken on the 4th of August, 1864. I do not think all this could have been accomplished within the short time after the sitting of

the legislature and the time of taking the deposition; if it had, it devolved on the appellants to show it. In the absence of such proof, in connection with the statement of the judge in his reasons given for allowing the deposition, it ought to be presumed that no change had then been effected in the jurisdiction and powers of a justice of the peace by the laws and constitution of the new State. A justice in Va., was a member of the county court which was a court of record as fully as any other court of the State. That court had a clerk and tried common law cases, had juries and exercised full chancery powers. Three justices of the county made a quorum, and each magistrate was therefore a judge of a court of record, and nothing in the record to show that at the time of taking the deposition they had lost their power. But it is insisted, as before stated that independent of the judicial character of the justice, the other facts stated by the court, fully warranted the reading of the deposition.

The appellees confidently submit to the court, the 2d, 3d and 4th bills of exception on the authorities referred to in their original brief.

The fifth bill of exception is the exclusion by the court of the deed of T. K. Knight, recorder of Doddridge county to John S. Hoffman, page 89 and 90 of Record. This deed is for 10,827½ acres of land returned delinquent in the county of Doddridge for the year 1857 in the name of Uriah Thompson, and sold in 1860 by the sheriff of Doddridge for the tax of 1857, which with the interest thereon and cost of sale, amounted to the sum of $52.81, and bought by said John S. Hoffman. This sale stood without further proceedings thereon, until the 25th of March, 1866, when a survey of the land was returned by the surveyor of Doddridge county to the judge of the circuit court of said county in vacation, and by said judge ordered to be recorded.

The Constitution of West Va., article 11, section 8, provides as follows: "Such parts of the common law and of the laws of the State of Virginia as are in force within the boundaries of the State of West Virginia, when this constitution goes into operation and are repugnant thereto, shall be and continue the law of the State, until altered or repealed by the Legislature."

The 37th chapter of the Code of Va., published in 1860, was the only law in force when the Constitution of West Va., went into operation which regulated the delinquency of land for taxes, the sale thereof and the mode under which purchasers could procure deeds for lands so sold and bought by them at delinquent sales. This law continued without change until the 27th day of February, 1866, (except the addition of these words to the 14th sect. of that chapter,) "or to the auditor of public accounts when the office of clerk of the county or corporation court is vacant," which addition was made by an act of the legislature of Va., at Wheeling, passed Feb. 4th, 1862.

The appellants have furnished in part a printed copy of chapter 37 of the code of Va. of 1860 in their new brief beginning in that brief at page 36. The appellants in their new brief omitted sect. 3 in the code and numbered sect. 4 in the code as sect. 3 in the brief and sect. 5 in code as sect. 4 in brief, and so on as to every section, so that sect. 17 in the code is numbered 16 in the brief. This error in the printed copy was not discovered until after this erased section was written, it is in the printed copy and numbered 16.

The appellants in their printed copy of chapter 37 have also omitted sections 26, 27, 28, 29, 30, 31, 32 and 33 of the code of 1860, which relate to the disposition of delinquent lands, and which do not tend in any wise to elucidate the question raised upon the rejected deed to Hoffman. By an act of the Legislature of West Va., passed Feb. 27th, 1866, the entire chapter 37 of the code of Va. of 1860 was absolutely and without qualification repealed, and the same act repealed the act of 1862 herein before alluded to as adding to the 14th section of said chapter 37, so that not a vestige of that chapter was left in force. This is admitted by appellants in their new brief, page 41.

By sections one and two of chapter 37 code of 1860, and printed in pages 36 and 37 of appellent's new brief, it is enacted that all lands delinquent for taxes since the 10th day of March, 1832, were subject to sale every five years to enforce payment of such taxes The Legislature of West Va., by the act passed the 27th day of Feb. 1866 aforesaid, changed the

law so that no sales could be thereafter made for any delinquency before the year 1865, and provided that these sales should be made every two years from and after the year 1865. This act was intended as a substitute for chapter 37 of the code of Va. which was repealed by it as before stated. The appellents in their new brief, page 44, profess to state the changes made by this act in chapter 37, and wholly omit to state that provision was made by the act of Feb. 1866 for sales made in 1865, that is made by section 33, the last sect. of the act and in these words:

"Lands sold in the year 1865 for non-payment of taxes, shall be redeemed according to the provisions of this act, and if not redeemed conveyances shall be made to the purchasers thereof according to the provisions of this act;" but no provision is made for purchasers in 1860 or any previous sale. The Legislature no doubt supposed that those who purchased in 1860 had obtained a deed, and if they had failed to procure it in the six years that had elapsed after the sale, their negligence was not to be favored, and that they intended the repeal should operate as a statute of limitation; such is the effect in case of a law repealed. Nothing can be legally done under and by virtue of a law repealed See Smith's Commentaries, page 887, sections 765, 6 and 7, Decisions to same effect repeatedly made by this court. To give validity to the deed a survey was required to be made and returned to the court. The court was required to examine, and if according to law, to approve it and order it to be recorded, and the clerk, (or the substituted recorder,) is required to make his deed. But it appears by the deed on its face, that when the survey was made and returned, when the court examined the survey and ordered it to be recorded, the law under which all this had been pretended to be done was repealed and that all these acts which were essential to the validity of the deed were null and absolutely void, what rights this purchase may have given the purchasers against the State, it is not necessary to enquire. It certainly did not divest the *legal* title of Uriah Thompson, or confer any *legal* title upon Hoffman, or create an outstanding title that could defeat the action of the appellees.

But the appellants in their new brief find consolation in the fact, that the act of the Legislature of West Va., passed October 7th 1863, substituting the recorder for the extinguished clerk of the county court, and the circuit court for the county court abolished by the Constitution of West Va. was not repealed.

Chapter 37 of the code was in full force, being left by the new constitution and without officers to execute its provisions it became a dead letter and utterly valueless. To avoid this and give effect to the chapter the recorder under the new constitution was subsituted for the county clerk to record the survey and make the deed, and the circuit court was substituted for the county court to examine the survey and if found accurate to approve it and order it to be recorded. Only such powers as were granted by chapter 37 to the county court were conferred on the circuit court by the act of substitution aforesaid, and only the same authority given to the clerk of the county court by chapter 37 was conferred by the said act of subsitution on the recorder. No new or additional powers were conferred by the act of substitution aforesaid on either.

It was an unqualified case of the substitution of one officer to perform the duties of another. The two acts united make an effective system. The destruction or repeal of one defeats the operation of the other. The extinction of the county court clerk, and the abolition of the county court defeated the effect of chapter 37, and now the repeal of chapter 37 makes the other inoperative.

The appellants feel the force of this objection and fall back on a claim of liberal interpretation to give the desired effect to this act of substitution. A demand for free and liberal interpretation to enforce a forfeiture or confiscation is in conflict with our entire system of law. The demand furnishes a rare instance of intrepidity in the the pursuit of property. A demand for a liberal construction of a law to divest the title of an honest owner to 10,827½ acres of land, worth perhaps $5 per acre, and confer it on another of at least questionable merit, for the price and consideration of $52.81. Such a proposition cannot be entertained by a court of justice. I feel assured that it will meet the condemnation of this court, and that the decision of the court below will be affirmed.

I shall now consider the 6th and last bill of exceptions, found on page 91 of the record.

The new brief of appellants does not allude to this bill of exceptions and the original brief so alludes to it, as to seem to abandon it. The latter brief at page 16 alleges that "the instructions given to the jury by the court did not clearly and correctly propound the law of the case" That "the claimant, to take the forfeited title, must have an apparent title, regularly derived from the commonwealth, &c." The appellees failed to produce all the title papers by which they derived their title under the Jabez Bacon patents issued by the State; but proved the loss of many of their title papers; proved that Peter Smith, the vendee of the Bacons immediately after his purchase in May, 1815, took charge of these lands and by his agent Mr. Underwood, who resided in the county where these lands were, superintended them and paid the taxes thereon until the year 1819, when he conveyed the lands to Gerritt Smith and Daniel Cady, who conveyed his moiety to said Gerritt Smith in the year 1836. See deposition of Gerritt Smith, Record 79 and 80; that the said Underwood continued to superintend the land for Smith and Cady until he conveyed to the Oberlin Collegiate Institute in 1839.

That as early as 1826 a tenant was put on the land, and soon thereafter divers other tenants were placed thereon and actually occupied the same, which occupation continued under the successive vendees of the Bacon grants until the institution of this suit; that the deeds having been lost the heirs of Peter Smith, deceased, uniting the deeds aforesaid united in a deed to the Oberlin Institute. See Record, pages 80 and 81. It was also proved that the heirs of Jabez Bacon had not preferred and did not intend to prefer any claim whatever to the lands. Many other facts of similar import were proved. These facts laid the foundation according to law, for presuming a grant from the heirs of Jabez Bacon to Peter Smith, as well as for the lost deed of P. Smith to Cady and Smith, and Cady to Gerritt Smith, which two last named deeds became unimportant for the transfer of title, by the deed of the heirs of Peter Smith aforesaid. This latter deed is a recognition of the deeds to Smith and Cady, and Cady to Smith, and intend-

ed only as a ratification of them. The presumption of the deed from the heirs of Bacon was a link in the chain of title with out which the action could not have been maintained, and was the question at the trial perhaps the most warmly contested; yet the question as to the sufficiency of the proof to deduce such presumption was not raised by the appellants at the trial. The instructions do not raise it, the exceptions are to the second and third instructions neither of which present that question. If the jury erred in the facts found by them from the evidence then it could only be corrected upon the motion for a new trial, to the refusal of which no exception was taken. That the appellees claimed the land as derived from the Bacon grants stands out most prominently in the whole case, and every reference to the claim of appellees to the land could not otherwise be understood than as a claim derived from the Bacon grants, whether fully or partially expressed, with these remarks as preliminary to a more minute examination of the instructions, let us compare them with the law.

The act of Legislature of Va., passed March 28th, 1843, the first section of which are in the words and figures following: Enacts "that all the right, title and interest which shall be vested in the commonwealth in any lands or lots lying west of the Alleghaney mountains by reason of the non-payment of the taxes heretofore due thereon, or which may become due on or before 1st day of January, 1845, or of the failure of the owner or owners thereof to cause the same to be entered on the books of the commissioner of the proper counties, and have the same charged with taxes according to law, by virtue of the provisions of the several acts of assembly heretofore enacted in reference to delinquent and omitted lands shall be and the same are hereby absolutely transferred to and vested in any person or persons, (other than those for whose default the same may have been forfeited, their heirs or devisees,) for so much as such person or persons may have just title or claim to, legal or equitable, claimed, held, or derived from or under any grant of the Commonwealth; bearing date previous to the first day of Jan., 1845, who shall have discharged all taxes duly assessed and charged against him or them upon such lands, and all taxes that ought to have been assessed or charged

thereon from the time he, she or they acquired title thereto, whether legal or equitable. Sess: Act of Va. 1842-3, Sec. 1. The same was enacted by the same legislature on the 20th Dec., 1841. See Session Acts for 1841-2—page 13, Sec. 3.

It will be observed that the *non lee* of the defaulting owner is not excepted from the benefit of this provision. It excepts only the party in *default*, his *heirs* or *devisees*—all others have the full benefit of it. The question was as to the effect of a forfeiture in the name of Bacon, when the Court in substance and almost in the language of this Act, decided that the forfeiture would inure to the benefit of the appellees if they had performed the conditions of the Act. It is true that the court may have erred as to the time when the forfeiture might inure, and the Act under which it would inure, but that could not prejudice the rights of the appellants. The question was, had the appellees acquired the title of Bacon, if forfeited? It was of no consequence whether acquired under one law or another, or at one time or another time. It was sufficient if the title had passed to the appellees before suit brought in January, 1860, or any other intermediate time, and by virtue of some other act. The passing of the title was the material question and not the act by which it passed, or the time when, so it preceded the suit. It may be assimilated to a correct opinion founded on false reasons.

The third instruction is intended to raise the question whether the Reed title, admitted to be forfeited, inured to the benefit of the Bacon grants which were vested in the appellees, who claimed them in every stage of the trial, and from which they derived the title on which the suit was founded. Compared with the same act, it will appear that every requisition of the act of 1843, aforesaid, had been complied with, to secure the transfer of the Reed title, forfeited for non-entry, to the appellees, the claimants of the Bacon title, which had been derived from the Commonwealth of Virginia.

By comparing the acts of 1841 and the act of 1843, with precedent acts of Virginia, on the same subject, it will appear that there is some difference in the requisitions necessary to secure the transfer of the forfeited title. The late or subsequent acts are less exacting. The words "*bona fide* claim" and

"actual possession of the land," are omitted in the later acts, to any of which acts the tranferree of the forfeited title may have the benefit to perfect his title, if these acts exist at the time of the suit brought.

Many acts of the general assembly of Virginia, and many opinions and decisions of judges of the court of appeals of Va. are inserted in the brief of appellants, but without applying them to any particular point in the cause. At the time this suit was brought the statute of limitations was 14 years, but the new brief of appellants says 15 years in one instance and 18 years in another. No question of the statute is raised in the cause by appellants and therefore to them unimportant. The only subject in the cause to which *time* is essential is from our claim to presume a deed. Actual possession commenced in behalf of the appellees as early as 1826, and possession of the title papers in 1815, and payment of taxes since 1816. This is ample time for such presumption. The actual occupation for a period equal to the statute of limitations alone is sufficient to presume a grant. But add to this possession of title papers, paying of taxes and a general snpervision of the land, such presumption may be made in much less time.

Benj. H. Smith
of Counsel for Deft. in Error

ADDITION TO RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 333.

WILLIAM B. DUNCAN, DAVID DUNCAN, AND WILLIAM WATTS SHERMAN, APPELLANTS,

vs.

MARY T. B. JAUDON.

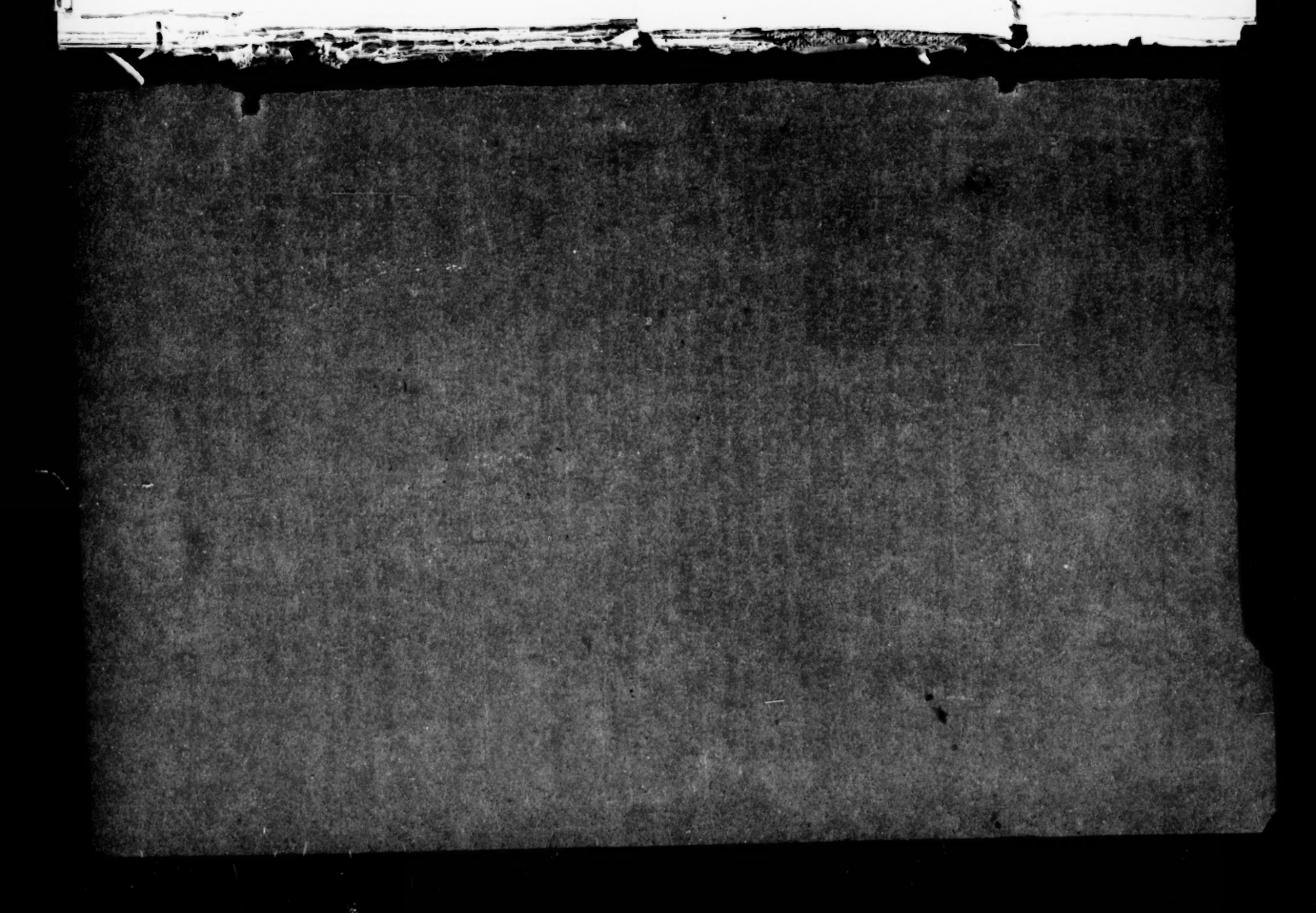
No. 334.

THE NATIONAL CITY BANK, APPELLANT,

vs.

MARY T. B. JAUDON.

FILED FEBRUARY 6, 1872.



1 The President of the United States of America to all to whom these presents shall come greeting:

Know ye that we, having inspected the records and files of the circuit court of the United States for the southern district of New York, do find certain paper writings there remaining of record, in the words and figures, following, to wit:

2 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on , the 31st day of May, in the year of our Lord one thousand eight hundred and seventy-one—

Present, the Honorable Samuel Blatchford, dist. judge.

MARY T. B. JAUDON, BY HENRY M. TABER, her next friend,
vs.
SAMUEL JAUDON, WILLIAM B. DUNCAN, David Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon.

This cause came on to be heard at this term upon the questions reserved by the former decree therein, and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed, as follows, viz:

That the stipulations of the solicitors of the parties respectively filed upon the making hereof, whereby the accounts provided by the former decree herein to be taken and stated by a master, are taken, stated, and agreed upon as to the amounts due, upon the principle declared in the said decree, be, and the same hereby are, accepted, as provided for in said stipulation, in lieu of, and as a substitute for, the report of a master, according to said former decree, and without prejudice to or waiver on the part of the defendants or either of *of* them in respect to the said or to this decree, as to their right of appeal therefrom and from each and every part thereof.

3 That the amounts due from the defendant Samuel Jaudon, on the said accounts are, as is stated and agreed upon in and by the stipulations aforesaid in his behalf, as follows, to wit:

For United States stocks, value		$5,600
Interest thereon		1,176
Total amount due in gold from Samuel Jaudon, with interest from June 1, 1871, in gold		$6,776
For seventy shares of Delaware & Raritan Canal Company stock, pledged to and sold by Duncan, Sherman & Co., value	$8,699 12	
Semi-annual dividends, at 5 per cent., and value of right to further stock, with interest thereon	2,990 11	
		11,689 23
For forty-seven shares of Delaware & Raritan Canal Company stock, value	5,897 91	

Semi-annual dividends, at 5 per cent., and value of right to further stock with interest thereon....	2,014 07	7,911 97
		19,601 20
Credits.....		790
Total amount due in currency from Samuel Jaudon, with interest from June 1, 1871.....		$18,811 20

That the amount due from the defendants William Butler Duncan, David Duncan, and William Watts Sherman, on the said accounts, is, as is stated and agreed upon, in and by the said stipulation in their behalf, as follows, to wit:

For seventy shares of Delaware & Raritan Canal Company stock, pledged to and sold by them, value.....	$8,699 12
Semi-annual dividends, at 5 per cent., and value of right to further stock, with interest thereon.....	2,990 11
Amount due from defendants Duncans and Sherman, with interest from June 1, 1871, in currency.....	$11,689 23

That the amount due from the defendants The National City Bank, on the said accounts, is, as is stated and agreed upon, in and by
4 the stipulation aforesaid in its behalf, as follows, to wit:

For forty-seven shares of Delaware & Raritan Canal Company stock, pledged to and sold by it, value.....	$5,897 90
Semi-annual dividends, at 5 per cent., and value of right to further stock, with interest thereon	2,014 07
Amount due from defendant the National City Bank, with interest from June 1, 1871, in currency.....	$7,911 97

That the defendant Samuel Jaudon forthwith restore the stocks in the former decree mentioned and referred to, to the trust therein mentioned and referred to, and bring them into court for and on account of said trust, in place of the value thereof as aforesaid, and forthwith bring into court and pay any balance of the amounts due from him as aforesaid in respect to the United States stocks aforesaid, in gold, and forthwith bring into court and pay any balance due from him as aforesaid in respect to the other stocks, in currency, for and on account of, and to restore the same to, the said trust; or, in case he shall not so as aforesaid restore the said stocks and balance to the said trust, that he pay and bring into court for and on account of, and to restore the same to, the said trust, the amount of six thousand seven hundred and snventy-six dollars, with interest from the 1st day of June, 1871, in gold coin of the United States, and the amount of eighteen thousand eight hundred and eleven dollars and twenty cents, with interest from the 1st day of June, 1871, being the sums due from him as aforesaid, with interest.

5 That the defendants William B. Duncan, David Duncan, and William Watts Sherman forthwith restore the seventy shares of stock aforesaid to the said trust, and bring them into court for and on account of said trust, in place of the value thereof as aforesaid;

and forthwith bring into court and pay any balance due from them as aforesaid for and on account of, and to restore the same to, the said trust; or, in case they shall not so as aforesaid restore the said seventy shares of stock and said balance to the said trust, that they pay and bring into court, for and on account of, and to restore the same to, the said trust, the amount of eleven thousand six hundred and eighty-nine dollars and twenty-three cents, due from them as aforesaid, with interest thereon from the 1st day of June, 1871.

That the said defendant The National City Bank forthwith restore the said forty-seven shares of stock to the said trust, and bring them into court for and on account of the said trust, in place of the value thereof as aforesaid; and forthwith bring into court and pay any balance due from it as aforesaid, for and on account of, and to restore the same to, the said trust; or, in case it shall not so as aforesaid restore the said forty-seven shares of stock and the said balance to the said trust, that it pay, bring into the court for and on account of, and to restore the same to, the said trust, the amount of seven thousand nine hundred and eleven dollars and ninety-seven cents, due from it as aforesaid, with interest from the 1st day of June, 1871.

That the defendants Samuel Jaudon, William B. Duncan, David Duncan, William Watts Sherman, and The National City Bank pay to the complainant her costs in this suit as taxed; and that the complainant have execution for such costs and for the sums above decreed to be paid by the defendants as aforesaid.

That there be paid to the complainant out of the proceeds of or moneys to be collected upon this decree, when and as moneys shall be realized thereon on account thereof, and applicable thereto, the several amounts adjudged to be paid thereby, in respect to interest and dividends, and interest thereon, viz: The amount of eleven hundred and seventy-six dollars, for interest on the said United States stocks, to be paid to her, with interest from June 1, 1871, in gold coin of the United States; the amount of two thousand seven hundred and sixty-four dollars and forty-four cents, ($2,764 44,) for dividends and interest thereon in respect to the said seventy shares of Delaware and Raritan Canal Company stock, to be paid to her, with interest thereon from June 1, 1871; and the amount of one thousand eight hundred and fifty-six dollars and ten cents ($1,856 10) for dividends and interest thereon in respect to the said forty-seven shares of Delaware and Raritan Canal Company stock, to be paid to her, with interest thereon from June 1, 1871, the complainant being entitled to said amounts for arrears of income due to her under and by virtue of said trust.

That the defendant Samuel Jaudon be, and he is hereby, removed from the office or position of trustee of the said trust as to the said United States stocks and the said Delaware and Raritan Canal Company stocks, and all interest, dividends, and increase, and interest thereon, and all claims in this suit relating thereto, and whatever may be realized under the decree herein as to those matters and things, he be, and he hereby is, enjoined and restrained from doing anything whatever in the further administration of said trust, and that the complainant be at liberty to apply to this court at the foot of this decree by motion or petition for the appointment of a trustee in place of the said Samuel Jaudon in respect to said stocks and bonds and the matters aforesaid.

That the complainant also have leave to apply to this court in like manner as last aforesaid for an order of the court directing the payment of her reasonable costs and expenses in the prosecution of this

action, the amount to be approved by the court, out of the proceeds of and collection upon the decree, beyond what is herein directed to be paid to her for her income as aforesaid.

It is declared to be the intention and construction of this decree that a restoration to the trust of the seventy shares or of the forty-seven shares of stock before named, with the dividends, proceeds, and interest thereon before named, or the payment into court of the equivalent for such restoration, as before directed, by any one of the defendants, shall satisfy this decree as to the property so restored or paid into court as between all the defendants and the trust.

(S'd) SAM'L BLATCHFORD.

8 (Endorsed:) U. S. circuit court. Mary T. B. Jaudon vs. Samuel Jaudon et al. Decree. Strong & Shepard, sol'rs for compl'ts, 90 Broadway, N. Y. City.

MAY 29, 1871.

GENTS: The within decree will be presented for settlement to Hon. S. Blatchford, at the U. S. court-house, on the 31st inst., at 11 a. m.

Yours,

STRONG & SHEPARD.

Service admitted May 29, 1871.

BOWDOIN, LAROCQUE & BARLOW,
Att'ys for Def'ts Duncan, Sherman & Co.
MERRIHEW & ARNOUX,
Att'ys for City Bank.
JOHN P. CROSBY, *Sol'r for S. Jaudon.*

Filed June 1, 1871.

9 Supreme Court of the United States.

WILLIAM B. DUNCAN & OTHERS
vs.
MARY T. B. JAUDON.

It is hereby consented that the solicitors for the appellants may procure from the clerk of the U. S. circuit court a supplemental return, embracing the final decree in that court in this cause, to be filed as of the time of filing the former return, and with the like effect as if then filed; provided, however, the same be done forthwith.

Dated New York City, 22d January, 1872.

STRONG & SHEPARD,
Sol'rs for Appellee.
W. W. MACFARLAND,
Of Counsel for Appellants.

(Endorsed:) Supreme Court of the U. S. William B. Duncan et al. against Mary T. B. Jaudon.

Consent to procure supplemental return from clerk of U. S. circuit court, &c.

STRONG & SHEPARD,
Appellants' Sol'rs, 90 Broadway, N. Y.

Filed January 22, 1872.

All of which we have caused by these presents to be exemplified, and the seal of the said circuit court to be hereunto affixed.

Witness the Honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, at the city of New York, in the southern district of New York, this 24th day of January, in the year of our Lord one thousand eight hundred and seventy-two, and of our independence the ninety-sixth.

[SEAL.] KENNETH G. WHITE, *Clerk.*

I, Samuel Blatchford, judge of the said circuit court, do hereby certify that the foregoing exemplification is in due form of law.

SAM'L BLATCHFORD.

(Indorsed:) Sup. Court U. S. 1871, Dec. term. No. 333, W. B. Duncan & al., app'ts, vs. M. T. B. Jaudon; and No. 334, National City Bank, app's, vs. M. T. B. Jaudon. Addition to record. Filed 6th February, 1872.

SUPREME COURT

OF THE UNITED STATES.

WILLIAM B. DUNCAN, DAVID DUNCAN and WILLIAM WATTS SHERMAN, Appellants,

against

MARY T. B. JAUDON, Appellee.

STATEMENT.

This is an appeal from a judgment of the Circuit Court of the Southern District of New-York against the appellants in an equity cause, wherein the respondent was plaintiff, and the appellants defendants.

The complaint commences on page 1, folio 3, of the record. The allegations therein contained, so far as they are material to the case of these appellants, are as follows:

It is alleged that under and by the will of her father, a trust was created for the benefit of Mrs. Mary T. B. Jaudon, the subject matter of which was certain personal property, whereof Samuel Jaudon became a trustee. (Folio 4.)

That on the 21st day of October, 1867, this personal property had assumed and then existed in the form of

117 shares of the stock of the Delaware and Raritan Canal Company, of the par value of $100 a share, and of certain Government bonds, &c., which it is not material particularly to specify, as they do not relate to the case of these appellants. (Folios 5 and 6.)

That in the month of October, 1867, the said Samuel Jaudon pledged and hypothecated 70 shares of this stock to the appellants, Duncan, Sherman & Co., as security for a loan of money, and that the certificates for this stock showed upon their face that it was held in trust, and that afterwards the stock so pledged was sold, and the proceeds applied in satisfaction of the loan, &c. (Fol. 9.)

These are all the material allegations of the complaint relating to the case of the appellants, Duncan, Sherman & Co.

The National City Bank was also made a co-defendant with Duncan, Sherman & Co.

It is not alleged that there were any joint transactions between these defendants touching this property, or any portion of it, of any kind whatever. It is alleged that Samuel Jaudon had certain other independent business transactions with the defendant, the City Bank, in the course of which he wrongfully used a certain other portion of the trust estate. It was and is believed by counsel for Duncan, Sherman & Co., that this was a misjoinder of defendants, and that the bill was on this account multifarious. Counsel thereupon interposed a demurrer, which will be found at folio 33, page 11.

The demurrer was overruled upon argument, with the usual leave to answer. Thereupon they answered. (The answer will be found at folio 45, page 14.) They say in their answer that they are bankers.

That on the 18th day of July, 1867, Samuel Jaudon, in the regular course of business, applied to them, at their banking-house, for a loan of $7,000, and offered to pledge as security therefor 70 shares of stock of the Delaware and Raritan Canal Company. That the stock being known to be of sufficient value as security, the proposition was accepted. That the certificates of stock were not even

seen by any of the principals of the house, but a clerk was directed to make the loan upon receiving certificates for the prescribed number of shares.

That they had no actual knowledge that these certificates appeared upon their face to be held by Samuel Jaudon as trustee, and no knowledge thereof except that which the law imputes to them from the fact, if true, that it was so stated in the certificate. That in October of the same year, and by direction of the said Samuel Jaudon, the stock in question was sold, and after applying so much of the proceeds as necessary to the satisfaction of the debt, there remained a balance of $969 34-100, which was duly paid over to Samuel Jaudon; and the defendants allege, that they have no knowledge or information whatever of any intended breach of trust on the part of the said Samuel Jaudon, and that they are *bona fide* purchasers of the stock for a valuable consideration.

The form of the certificates in question will be found at page 36.

The defendant below, William Butler Duncan, was examined on behalf of the complainant. (Page 39, fol. 114.) The transaction was had with Mr. Duncan alone, and his statement of it, which is uncontroverted by any other testimony in the case, and the accuracy of which has never been disputed, amounts simply to this, in substance:

Mr. Jaudon called at his office for a loan of money upon the security of this stock. He decided to let him have it, and told his cashier, Mr. Hull, to attend to the matter.

This transaction is stated in the same manner by Samuel Jaudon himself, who was examined on the part of the plaintiffs. (Fol. 136.)

In a casual conversation at the time of this loan and afterwards, Mr. Duncan thinks there was something said about an investment in coal bonds, that is, the bonds of a Pennsylvania Coal Company.

Mr. Duncan says, (page 40, fol. 116,) "I told Mr. Hull to carry out Mr. Jaudon's instructions, and had some conversation with Mr. Jaudon at that time about what

he was doing, in which Mr. Jaudon mentioned to me he was making some change of security in some coal bonds. I knew nothing more of the transaction except that the cashier carried out my instructions, or Mr. Jaudon's instructions rather," &c.

This casual conversation is again spoken of at page 44, fols. 127, 128.

The will, by which the trust in question was created, will be found at page 82 of the record.

By the 15th clause of his will this testator directs his executors to invest in the stocks of the United States, or the stock or funds of any individual State. And by a codicil to his will (fol. 236) he directs that the loan which he may hold of the City of Philadelphia, &c., and the ground-rents, shall be considered as equal to the United States or State stocks, &c.

It will be seen, therefore, that the stock in question was not within the description of the will. Hence no question can arise, based upon the testator's directions touching investments, even if such a question might arise and become material as between the beneficiary and a purchaser of the securities specified in the will from a trustee—a point that it is not necessary to discuss. The naked question which this case presents is, whether the purchasers, Messrs. Duncan, Sherman & Co., have so dealt with the trustee, Jaudon, in respect to the stock in question, as to render them liable as parties to a breach of trust—to make restitution.

Assignment of Error.

The court erred in decreeing as matter of law upon the facts that the defendants Duncan Sherman & Co. are liable as parties to a breach of trust, and in rendering judgment against them

FIRST POINT.

The case is somewhat embarrassed by the fact that the bill embraces two perfectly distinct supposed causes of action against different defendants, in no wise connected with each other, whose dealings were entirely separate and independent and of very different character.

The bill is plainly multifarious within the rule of plead-

ing on this subject, and the respective parties defendant are subjected to precisely the inconvenience in its most aggravated form, against which the rule was intended to guard.

Barbour's Eq. Pr. 40.
Harrison *vs.* Hagg, 2 *Psy. Pr.* 323.
2 *Aust.* 469.

However, as the demurrer interposed on this ground was overruled, and the defendants answered over, it is perhaps too late to raise the objection, except for the purpose of pointing out the necessity of looking carefully into the merits of the case of each defendant separately in order to do justice to each.

Aside from this point of pleading, the case may be said to present itself to this court for the first adjudication upon the merits of the defence of the respective defendants, inasmuch as it is quite plain that the judge at the Circuit went quite wide of the principles upon which their defences must stand or fall.

Second Point.

The defendants, Duncan, Sherman & Co., are bona fide pledgees of this stock, which they received as security for a loan made at the time.

The application was made for a loan upon so many shares of the stock of the Delaware and Raritan Canal Company. The certificates of stock were not produced, nor was any notice given that the stock was held in trust. The defendants, knowing the security to be adequate, agreed to make the loan, and gave the necessary instructions to a clerk, who subsequently, as a mere matter of business routine in carrying out the agreement that had already been made, received the certificates.

Upon this state of facts, the defendants, Duncan, Sher-

man & Co., are not to be charged with even constructive notice of the existence of this trust.

Lowry *vs.* Commercial Bank, Maryland Circuit, 1848, reported 3d *Bankers' Mag.* 2111.
Albert *vs.* Savings Bank, 1*st* *Maryland Ch. Decisions*, 408.
Same case, 2*d* *Maryland*, 160.
Atkinson *vs.* Atkinson, 8 *Allen*, 15.

THIRD POINT.

Assuming, for the purposes of the argument, that the defendants, Duncan, Sherman & Co., are to be charged with constructive notice that the stock in question was held subject to some trust, from the circumstance that the word trustee appeared upon the face of the certificates, it is submitted that such notice cast upon the defendants no other duty than that of ascertaining whether the power to sell and buy securities ordinarily attending the title to such securities, had been in this case lawfully withheld from the trustee by the terms of the trust.

Ashton *vs.* Atlantic Bank, 3 *Allen*, 217.
Lowry *vs.* Commercial Bank, *Maryland Circuit*, 1848, reported 3 *Bankers' Mag.* 2111.
Albert *vs.* Savings Bank, 1 *Maryland Ch. Dec'ns*, 408.
Same case, 2 *Maryland*, 160.
Atkinson *vs.* Atkinson, 8 *Allen*, 15.
Perry on Trusts, sec. 225.
Pa. Life Ins. Co. *vs.* Austin, 42 *Pa. State*, 257.
Dodson *vs.* Simpson, 2 *Randolph*, 294.
Garrard *vs.* Pittsburgh and Connellsville, &c., Co., 29 *Pa. State*, (5 *Casey*,) 154.
Tillinghast *vs.* Champlain, 4 *Rhode I.* 173, 213.
Field *vs.* Schieflin, 7 *Johnson's Ch.* 160.
McLeod *vs.* Drummond, 14 *Vesey*, 152, 352.

Gray *vs.* Johnston, 3 *English and Irish Appeal Cases*, 1.
Shaw *vs.* Spencer, 100 *Mass.* 382.

While in the case of executors the law implies the power to dispose of the personal assets, and a purchaser may, as a rule, assume its existence without inquiry, and while in the case of strict trustees, where the purchaser has notice of the existence of the trust, it may be necessary for him to ascertain that the power of sale has not been withheld by the terms of the trust; nevertheless, unless it has been withheld, and the trustee is therefore unable to sell without committing a breach of trust, the principles of law, which govern both cases, are from that point forward identically the same, and are so treated in all the authorities.

Hence in the foregoing authorities, touching similar transactions with executors, guardians, &c., selected for the clear exposition which they contain of the principle embraced in the proposition.

In cases where it is the duty of the purchaser to inquire into the trustee's power to sell, and he finds that he possesses this power, and may sell, without by the act of sale committing a breach of trust, he has the right to presume, as the law presumes, in favor of honesty and against fraud.

Broom's Legal Maxims, page 911.

There are a few cases in which the purchaser is bound to see to the application of the purchase money. To this class the foregoing observations are of course inapplicable, but to this class the case at bar does not belong.

Fourth Point.

A pledge or mortgage stands upon the same footing and is governed by the same principles as a sale, it being

but a part execution of the larger power, and the exercise of which may be just as beneficial to the beneficiaries.

Petrie *vs.* Clark, 11 *Serg. & Rawle*, 388.
Miles *vs.* Durnford, 2 *Sim.* (*U. S.*) 234.
Russell *vs.* Plaice, 18 *Bevan*, 21.
Pennsylvania Life Insurance Co. *vs.* Austin, 42 *Pa. State*, 263.
Ashton *vs.* Atlantic Bk., 3 *Allen*, 217.

Fifth Point.

There was no violation of the trust in question by the trustee in disposing of the stock in question. It did not even belong to any of the classes of securities in which the testator expressed a desire to have his estate invested. For aught the defendants knew, it might have been the intention, as perhaps it was the duty of the trustee, by raising the money in question, to arrange for the re-investment of the trust funds in the class of securities contemplated by the testator. It may be well to observe here, for it is a fact not destitute of significance, that the testator's express desire in regard to the character of the investment of the trust funds, was disregarded with the consent and at the solicitation of the beneficiaries, in hopes of thus securing a larger income.

See Case, pp. 54, 55, 59, 70, 71, 77, 80 and 81.

Whatever might have been the argument on this point, if the security pledged had belonged to the class specified in the will, it is not possible to regard this disposition of the stock in question as a violation of the terms of the trust, and hence a breach of the trust, because the stock did not belong to the class of securities specified by the testator.

By this disposition of the stock in question, the trustee

violated no command of the testator—no provision of his will; and if the defendants are to be charged with constructive notice of the mere fact that the stock in question was held subject to some sort of trust, they are likewise entitled the benefit of the presumption that the trustee intended to perform his duty in the premises.

They are both presumptions existing independent of the actual existence of the facts presumed, and while both may be fictions in a particular case, the benefit of the one should attend the burthen of the other.

Sixth Point.

A class of cases were cited below, having no possible bearing upon the case at bar, or any principle applicable to the case, but which seem entirely to have misled the judge at the Circuit. The cases cited were the following:

Bayard *vs.* Farmers', &c., Bank, 52 *Pa. State*, 232.

In this case a trustee applied for the transfer of certain stock standing in his name as trustee. The bank insisted upon being advised of the terms of the trust, that they might see whether a transfer was proper. A friendly suit was constructed for the purpose of settling this question, and the court held, that if the bank insisted upon it, they had the right to know the terms of the trust. This was the sole point decided.

Brig "Ploughboy," 1 *Gal.* 41.

Certain goods which had been forfeited to the United States were purchased with notice of the forfeiture, and it was held that the purchaser obtained no title as against the Government.

Carr *vs.* Hilton, 1 *Curtis*, 390.

This was a controversy between an assignee in bankruptcy and a creditor, and has no possible bearing in the case at bar.

Hind *vs.* Vattier, 1 *McL.* 110.

This was the case of the purchase of land with constructive notice of an outstanding equitable title in another, and it was of course decided that the purchaser could not hold.

Dexter *vs.* Harris, 2 *Mass.* 531.

The marginal note of this case is as follows:

A *bona fide* purchaser, for a valuable consideration, without notice of any fraud in the grant to his vendor, shall hold the estate against the original vendor and his heirs.

Oliver *vs.* Pratt, 3 *Howard U. S.* 333.

This was a case involving the title to land, and the proposition of the case is that the purchaser, with notice of an adverse equity, takes subject to it.

Mechanics' Bank *vs.* Seton, 1 *Peters*, 299.

One Linn had purchased stock of the bank as trustee, with trust funds, of which the bank had full notice. The beneficiaries demanded a transfer, and Linn desired to make it. The bank refused, claiming a lien on the stock for the individual indebtedness of Linn, and it was held that the bank was bound to make the transfer.

Wormley *vs.* Wormley, 8 *Wheaton*, 421.

In this case there was a sale of land in violation of a trust, and the only question was, whether, upon the facts, the defendants were *bona fide* purchasers within the rule.

Garrard *vs.* Pittsburgh and Connellsville R. R., 29 *Pa. State*, 154.

Lariman was the president of the rail-road company, and as such was possessed of certain bonds of the company, with authority to negotiate them. He pledged some of them as security for a private debt, and it was held that his creditor could not hold them. This is the proposition of the case: "A purchaser, with notice that the sale is a breach of trust or a fraud upon the rights of the real owner, is *particeps criminis*, and his purchase cannot protect him against the owner, because *such a purchase* is not *bona fide*."

Jaques *vs.* Weeks, 7 *Watts*, 267.

This was the case of a mortgage attended by a separate defeasance, and the question was whether the purchaser had notice of the defeasance.

Epley *vs.* Witherow, 7 *Watts*, 163.

This case involves simply the question of an estoppel *in pais*, by the silence of the owner of land while it was being disposed of by another.

Hill *vs.* Epley, 31 *Pa. State*, 321,

Is a case of the same kind.

Anderson *vs.* Van Allen, 12 *John.* 344.

In this case it was decided that a court will protect the rights of an assignee of a chose in action against the fraudulent acts of the assignor.

Pendleton *vs.* Fay, 2 *Paige*, 201.

In this case it was decided that a power to sell lands given to executors must be strictly followed.

Baker *vs.* Bliss, 39 *N. Y.* 70.

This was a case of a fraudulent conveyance of land and a question of notice.

McLeod *vs.* Drummond, 17 *Vesey*, 152,

Is the very well known case, already cited by the defendants.

It was the case of a pledge by executors of bonds for advances from time to time. The pledge was upheld and the bill dismissed.

Petrie *vs.* Clarke, 11 *Sergt. & Rawle*, 372.

In this case the pledge of assets by an executor for an antecedent debt was held to be voidable. It was also held, that if the pledge had been for a present advance, it would have been good.

Shaw *vs.* Spencer, 100 *Mass.* 394,

Is a case in favor of the propositions upon which the defendants rely, and is cited by them.

Hill *vs.* Simpson, 7 *Vesey*, 172,

Was the case of the pledge of assets by an executor for the security of his private debt and for future advances, and the pledge was set aside.

Seventh Point.

It is submitted that the decree of the Circuit Court, as to the defendants, Duncan, Sherman & Co., should be reversed.

W. W. Macfarland,

Of Counsel for Duncan, Sherman & Co.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y

Supreme Court

OF THE UNITED STATES.

The National City Bank of New York, Appellant, *against* Mary T. B. Jaudon.	Points for Appellant.

Statement of Facts.

This is an appeal from a decree of the Circuit Court of the United States for the Southern District of New York, in favor of Mary T. B. Jaudon, the complainant therein, and against the National City Bank, the appellant, in this court, on a cause of action that arose under the following circumstances.

In the month of July, 1833, Commodore William Bainbridge, a resident of Philadelphia, departed this life (fol. 192), leaving him surviving his widow, his daughter Susan P. Hayes, Mary T. Bainbridge, who subsequently married Charles P. Jaudon, Lucy Ann Bainbridge and Louisa A. W. Bainbridge (fol. 197–251) and also leaving duly executed his last will and testament (fol. 229, etc.), bearing date the 15th day of

June, 1832 (fol. 235), by which he provided as follows: "Fifteenthly, I do hereby appoint my friends William "Lynch and Hugh Calhoun, two of my executors, as "trustees, to receive all the residue of my estate what- "soever and to invest the same in the stocks of the "United States or the stocks or funds of any individual "State, and to hold the same in trust for the following "purpose (fol. 232).

"*First*. I direct that $28,000 be invested as aforesaid, "as the trustees may see fit, the interest thereof to be "paid to my beloved wife, Susan Bainbridge, during her "natural life, for her sole use and benefit, and at the end "of her natural life the said stocks or funds to be equally "divided, share and share alike, between my daughter, "Susan P. Hayes, Mary T. Bainbridge, Lucy Ann "Bainbridge, and Louisa Alexina Bainbridge, the trust "to remain the same for their sole use and benefit. In "the event of any of their demise before the end of "my wife, Susan Bainbridge's natural life, and leaving "children, the said children are then to have the por- "tion which their parent would be entitled to by this "bequest. * * * * (fol. 233),

"*Fourthly*. I do hereby direct my trustees to invest "in such funds or stocks as has heretofore in this in- "strument been directed, the equal one fourth part of "my estate in trust, the interest whereof to be paid to "my daughter, Mary T. Bainbridge, for her sole use "and benefit during her natural life, and at the end of "her natural life, the amount so invested to be equally "divided between her children" (fol. 234).

This will was drawn up by the testator personally, and was so far deficient in technicalities of the law as to make no provision for the contingency of the decease of his daughter without issue (fol. 235), a contingency that undoubtedly will happen in respect to Mrs. Jaudon, and her sisters presumably will be the inheritors of the principal of the trust so created.

The testator also executed a codicil to his said will which enlarged the authority of the said trustees, in re-

gard to investments, so as to include ground rents, in Philadelphia, and loans of Philadelphia and Southwark, but which in no respect affects the questions involved in this action (fol. 236).

The will and codicil, were on the 3d day of August, 1833, duly admitted to probate, in Philadelphia, (fol. 242,) and the said William Lynch and Hugh Calhoun, accepted the trust therein created. At that time and down to the relinquishment of the trust by them, no part of the trust estate was invested in the Delaware and Raritan company shares, hereinafter mentioned (fols. 134, 228).

On the 20th day of May, 1835, a little less than two years after the acceptance of the trust, the said trustees, petitioned the Court of Common Pleas to be discharged from their trust and to surrender the residue of the estate under their care to such person as the court might appoint (fol. 245).

The accounts of the petitioners were certified to be correct by Mrs. Jaudon (fol. 246,) and on her consent the court appointed said Samuel Jaudon, one of the defendants herein, to be trustee, in the place of the testamentary trustees *without security* (fols. 246, 247). The reason for this change was, that the trustees were honorable men, and could not be persuaded to violate their trust, and Mrs. Jaudon, with the others, desired a more pliable trustee. She was asked on her examination, what led the trustees to resign the trust, and she answered "they were old gentlemen; and one of "them did not care about holding on, it was a volun- "tary thing on his part; the other was very far ad- "vanced in life, *and he was not acceptable to us*," (fols. 198, 258)." Mr. Samuel Jaudon, stated why he was not acceptable to Mrs Jaudon, and her sisters. They wanted an investment that would produce a larger income than the Pennsylvania five per cent. bonds did, in which the testator had invested the bulk of his estate (fol. 198,) and the testamentary trustees were unwilling to make any changes, thereupon Mrs. Jaudon

expressed a wish and desire, that those trustees should resign, so that some one might be appointed who would make such investments for them (fol. 155.) The testamentary trustees, in accordance with such wish, did resign, and at the request of Mrs. Jaudon, *Mr. Samuel Jaudon was appointed trustee, for the express purpose of violating the provisions of the trust with her knowledge and approbation* (fols. 156 to 158).

In pursuance of this scheme, the Pennsylvania five per cent. stock was forthwith sold and converted into money, and Mr. Samuel Jaudon invested the proceeds in the stock of the Delaware and Raritan Canal Company, according to the arrangement previously made; Mrs. Jaudon distinctly spoke of this stock as one that would be substituted for the stocks held by her father, and that came from the original trustees (fol. 158, Q. 131). This investment was made very soon after the new trustee was appointed (fol. 134, Q. 30), and was made for all the sisters, and was perfectly agreeable to them all (fol. 201). Mrs. Jaudon considered that the trustee was acting very judiciously, and was very glad of it (fol. 154). The amount of stock so purchased by Mr. Jaudon with the funds that he had in hand from the sale of Mrs. Jaudon's share of the Pennsylvania fives, was ninety-three shares (page 76, Q. 168), and the dividends paid by him to her thereon exceeded the income she had before received by about one-third (fol. 204). Year after year she received these moneys with full knowledge of the source from which they were derived, without the slightest disapprobation of the investment or the dividends (fol. 158).

Subsequently, at a time not definitely stated, but prior to the decease of her mother (fol. 216, Q. 205), with the assent of Mrs. Jaudon, about $4,000 additional of the principal of the trust estate, was converted into money, and the proceeds invested in the Dauphin Coal Company's stock, which was at the time supposed to be a good investment, but proved to be an injudicious one. Like the unsubstantial fabric of a

dream, in the expressive language of Mrs, Jaudon, "it vanished." To this violation of trust she not only assented (fols. 209, 210), but in addition thereto, she placed the further sum of $4,000 of her own money in Mr. Jaudon's hands, to be invested in the same worthless stock (fol. 215).

The widow of Commodore Bainbridge died in 1857 (fol. 194), and on the division of the $28,000 held in trust during her life, Mrs. Jaudon received twenty-eight additional shares of said canal stock (fol.).

In 1865, acting under the general authority that had originally been given to him; and which he believed still continued to exist, that he was at liberty to make such reinvestments as in his judgment would increase Mrs. Jaudon's income, and that any change he deemed advisable for her interest would be approved by her (fol. 157), Mr. Samuel Jaudon make a purchase of Broad Top Coal Company stock, in the anticipation that the income of Mrs. Jaudon would be largely increased (page 55, Q. 121), and to pay therefor, he borrowed of the National City Bank, on the 16th day of October, 1865, $6,000, and on the 27th day of November, 1865, the further sum of $3,500, and hypothecated with the bank 47 shares of said stock, as security for said loans, which were afterwards consolidated and renewed from time to time, until the 10th day of October, 1867. This security was given by delivering the certificates of stock with powers of attorney annexed, duly signed by Mrs. Jaudon. Mr. Jaudon also for the same purpose obtained of Messrs. Duncan, Sherman & Co., on the 18th day of July, 1867, the sum of $87,000 on a sixty days' loan, hypothecating therefor seventy shares of said stock. Mr. Jaudon was so sanguine in respect to this purchase of Broad Top Coal stock, that he stated to Mr. Duncan that he thought he should want the loan for a very short time, for he had a large property in the Broad Top Coal and Iron Company, which he believed was very valuable, the company was about in operation; that he expected it to turn out a very

productive and highly remunerative property, and he presumed that he would be perfectly able and competent within that time to repay the loan from that source, and that he so informed Mr. Duncan (fol. 137 . Instead of this investment proving as profitable as had been anticipated by Mr. Jaudon, it resulted in a total loss, like the Dauphin Coal Stock investment, and thereupon Mr. Jaudon gave the parties holding the stock orders to sell the same (fol. 89), which orders were obeyed in December, 1867, and the proceeds of sale were applied to the liquidation of the loans so far as necessary, and the balance paid over to Mr. Jaudon (fol. 90).

On the 12th day of October, 1867, the complainant filed her bill in equity against the said National City Bank, the individuals composing the firm of Duncan, Sherman & Co., and Samuel Jaudon praying that the said Samuel Jaudon might be dismissed from his trust and account for the said stock, and that the other defendants might be decreed severally to account for and to restore to the trust the shares of stock hypothecated with and subsequently sold them together with all dividends, or that they might be decreed to pay the value thereof (fol. 14). The defendant Samuel Jaudon, permitted judgment to be taken against him *pro con* (fol. 43). The other defendants demurred for multifariousness, and the National City Bank for the further reason that the owners of the residuary estate were not made parties ; that the complainant had not legal capacity to maintain an action against the said bank in her own name ; that the trustees and their successors in trust held the property and the right of action was in them or him, and not in the complainant for the matters set forth in the bill (fols. 27–29).

The demurrer came on for argument before the Hon. Samuel Blatchford, who ordered that the same should be overruled with costs, and with liberty to the defendants to answer (fols. 141, 142).

The bank thereupon filed its answer, in which they alleged and insisted that they were *bona fide* purchasers of said stock for a good and valuable consideration, without any notice or knowledge of the rights of the complainant therein, and without any notice of any actual or intended breach of trust on the part of said trustee, and without any notice of the existence of any trust except so far as notice might be imputed from the form of the certificate (fol. 60), and they also stated that they never became the legal owners of said stock, but with the consent and under the direction of said Samuel Jaudon, caused the same to be sold under a power of attorney signed by said Jaudon, and the stock was transferred directly from said Jaudon to the purchasers (fol. 57).

On the 31st day of May, 1871, the issues having been tried before the Hon. Samuel Blatchford, a decree was entered in favor of the complainant for the relief demanded in her petition, and directing that the National City Bank pay and bring into court for and on account of, and to restore to said trust the sum of $7,911.97 (fols. 253, 260) from which decree the National City Bank, on the 9th day of June, 1871, duly appealed to this court (fols. 281 to 290.)

The opinion of the court below will be found in 8 Blatchf. R., 430.

Note—The case of Jaudon *vs.* Duncan, Sherman & Co., immediately preceding this case upon the calendar of this court, presents substantially the same questions as this does. After the preparation of these points had been partially completed, through the courtesy of the appellants' counsel in that case, the counsel herein received a copy of his points, and as the legal position therein was so obviously correct, and the ability with which that position was presented manifest in the research in citation of authorities so exhaustive, the counsel herein determined to rest his part of

the argument which would traverse the same ground to that brief, and present such other points as might have weight with the court, as follow:

POINTS.

I.

The demurrer of the appellant was well taken, and the court below erred in overruling the same. This tribunal can review and correct such errors.

1st. The bill was multifarious.

This is conclusively shown by the decree itself, for that provides three separate and distinct judgments, first, against Samuel Jaudon, the trustee, for his removal; for a money judgment against him for the stocks alleged to be converted above referred to, and for other securities that he had also converted—second, a judgment against Duncan, Sherman & Co., for certain stocks adjudged to have been converted by them—and third, a judgment against appellants for the stocks adjudged to have been converted by it. There is no community of interest whatever among the different defendants.

McGachen *vs.* Dew, 15 Beav., 89.

2d. The complainant below had not legal capacity to sue. She had neither the legal nor the equitable title to said stock, for she was neither trustee nor remainderman. The proper course to have been pursued was to have the new trustee appointed, and then for such trustee to have filed the bill because he would be possessed of the title and have capacity to maintain such action.

3d. The complaint did not state facts sufficient to constitute a cause of action.

The complaint states (fol. 4), that the trustees were directed to invest a portion of the residuary estate of Com. Bainbridge, in trust, the interest to be paid to complainant during life, and remainder to her children; that Samuel Jaudon, as such trustee, on or about the 21st day of October, 1867, held for complainant's benefit 117 shares of said canal company's stock.

(1.) The complaint does not state that such investment was authorised by the will, which was a necessary allegation, for under the laws of Pennsylvania a trustee cannot invest in such stocks where the will is silent on the subject, and such investment is a breach of trust.

Laws Pa., 1832, 1838, 1850, 1852.
Hemphill's Appeal, 18 Penn., St., 303.
Worrall's Appeal, 22 Penn., 44.
9 Barr., 508.

(2.) The complaint was further defective in not showing authority to sell and reinvest at the time alleged.

Without express authority trustees cannot sell and reinvest.

Williams *v.* Nixon, 2 Beav., 672.
Tyler *v.* Tyler, 3 Beav., 550.
Adams *v.* Clifton, 1 Russ., 297.
Hamburg *v.* Kirkland, 3 Sim., 265.
Pawlett *v.* Herbert, 1 Ves. Jr., 297.
Underwood *v.* Stevens, 1 Mer., 712.
Crackelt *v.* Bethune, 1 J. & W., 586.
Witter *v.* Witter, 3 P. Wms., 100.

4th. The general doctrine is that where personal

property is bequeathed for life, with remainder over and not bequeathed specifically, it is the duty of the trustees or executors to sell the same within a reasonable time, and invest the proceeds in government or similar security.

Howe *v.* Earl of Dartmouth, 7 Ves., 137.
King *v.* Talbot, 50 Barb., 453.
Affirmed N. Y., 40 N. Y., 76.

As to the liability of trustees for improper investment,

See 10 N. Y. Legal Observer, 321.

5th. Appellate courts, on an appeal from final judgment, can review interlocutory orders or decisions.

Coyle *v.* City Brooklyn, 41 N. Y., 619, note.

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II.

The sale of Pennsylvania State Five per cent. bonds by Samuel Jaudon, was an unlawful conversion of the trust fund, and the investment by him of the proceeds in canal company stock was also an unlawful act, which could not constitute said stock part of the trust estate or impress it with the terms of the trust, no matter what arrangement was made by him with the life tenant in respect thereto, and therefore the addenda of the words "Trustee for Mary T. B. Jaudon," was simply *descriptio personæ*, and did not affect the absolute legal title in him of said stock.

1st. That the first sale was unlawful, is established by the authorities cited on the first point under the proposition "that without express authority, trustees cannot sell and reinvest," fortified by the

fact that the will in evidence gives no such authority, and that such sale is contrary to its spirit and meaning. And such is the langage of the opinion of the court below. "A trustee presumptively holds his trust property for administration and not for sale."

2d. The investment in canal company stock has also been shown by authority and positive statute to have been unlawful, and the same is not only against the law, but it is also against the legal construction of the provisions of the will itself.

Perry on Trusts, 431, § 470.
Perry on Trusts, 406, citing many cases to the effect that the provision to sell or divide at a future time, must be held to show the testator's intent, that in the meantime, the trust property is to remain in specie.

3d. The consent of the life tenant did not legitimate this purchase, because trust investments cannot be varied where parties are not *sui juris* or not *in esse*.

Wood *v.* Wood, 5 Paige., 596.
Trans. University *v.* Clay, 2. B. Mon., 386.
Contee *v.* Dawson, 10 Bland., 264.
Deaderick *v.* Cantell, 10 Yerg., 263.
Burrell *v.* Shield, 2 Barb., 457, 469.
Personeau *v.* Personeau, 1 Des., 521.

Even the remainderman cannot acquiesce, so as to be bound, until his interest falls into possession.

Bennett *v.* Colley, 5 Sim., 181; 2 My. & K., 225.
Brown *v.* Cross, 14 Beav., 105.

4th. The legal presumption is that words added to a name are descriptive of the person, and such presumption holds in this case.

Moss *v.* Livingston, 4 N. Y., 208.
Bank of N. Y. *v.* Bank of Ohio, 29 N. Y., 630.
Bank of Genesse *v.* Patchen Bank, 3 Keyes, 315.
Taft *v.* Brewster, 9 Johns., 334.

5th. The burden of proof was upon the appellee to rebut this legal presumption, but instead of so doing, the proof showed that the legal presumption accorded with the facts in the case.

6th. These words of description, therefore, cannot be held to have the effect to put the appellant upon inquiry, but if they should be held to have had that effect the result is the same, for the bank's liability under the circumstances of this case cannot be greater than it would have been if they had instituted an investigation into the alleged title of Samuel Jaudon as trustee, to the stock. The result of such investigation would have been to show that the assertion that he held it as trustee was false and that those words annexed to his name were, as claimed herein, merely descriptive, for no declaration of either Samuel Jaudon or Mrs. Jaudon could weigh against the language of the will and the laws of Pennsylvania. The bank, acting innocently in this matter, is only borund by the truth and the truth is that the stock in question never was part of the trust estate but was held by Samuel Jaudon in his individual capacity, which is.

In the language of the court below in reference to the last investment, but can be applied to the stock which is the subject of this action with greater force.

That stock was a stock which Mr. Duncan (or the city bank), *was bound to know* was a security in which it was *unlawful*, by the general principles of law and in the absence of special authority, *for a trustee to invest trust funds.*" And inquiry would have shown, for such was the fact, that there was an "absence of special authority."

Holding that "the circumstances were such as to put the parties on inquiry," the court further says, and in language that shows, as we most respectfully submit, in a most marvellous manner, clear apprehension of the principles of the law itself combined with a most illogical deduction or blindness in the application of those principles. "Inquiry would have directed them to the *cestui que trust*" (either to the will itself creating the trust), and the unlawfulness of the transactions would have been disclosed. * * * The case is not even one of a sale of the shares" (substitute Penn. Fives), "directly, which might presumably be within the scope of the authority of a trustee, *with a view to a reinvestment within such authority.*" * *

The law implies notice to them of the terms of the trust "(as fixed by the will)" whose existence the certificates disclosed. It was negligence in them to take the certificates in pledge for the loans without inquiry. Such inquiry would have shown that the investment of the moneys in the canal Stock "was for no purposes of the trust," and therefore could not be held thereunder so that they could rightfully treat with Samuel Jaudon as the owner thereof.

7th. In rendering judgment so contrary to the spirit of the opinion in the court below no allusion is there made to the application of the principles

thus laid down to the canal stock, but the same is treated by the judge as being a lawful investment made pursuant to the directions of the will itself, except that in the statement of facts the judge says, respecting it. "Although this was an investment not authorized by the will, *the plaintiff approved of it*, and from time to time received from the trustee the dividends," and then dismisses that question as if it had no weight or importance in the case. This silence is intentional, for the question as presented here was argued in that court.

III.

As the act of Samuel Jaudon which is complained of in this action was the direct consequence of the breach of trust committed by him in making the sale of the Pennsylvania State Bonds, and as the appellee concurred in such breach of trust, she is forever estopped from proceeding against the said trustee for such consequences, and *a fortiori*, from proceeding against the appellant, who is an entirely innocent party.

1st. The change of trustees was made, as has been already shown, because Mrs. Jandon and the others desired that the original breach of trust should be made and the testamentary trustees were unwilling to become parties thereto, and the avowed object was to increase the income by such illegal investment. So that Mr. Jaudon, the trustee, understood that whenever an investment presented itself by which he could still further increase the income to be paid to Mrs. Jaudon he had her sanction to make such change. Therefore we assert that this conversion, if such it can be called, of

the canal company's stock was the direct consequence of Mrs. Jaudon's sanctioning the change of trustees and sale of the Pennsylvania Bonds. So that here, as to Mrs. Jaudon, the language of the opinion below is pertinent "*she* enabled him to commit the breach, of trust which he committed. What he did was accomplished by *her* cooperation."

Fyler *v.* Fyler, 3 Beav., 550, 1841.

This was an action for restitution of certain trust funds that had been lost by a breach of trust and bears an analogy to the case at bar for the reason that no loss or inquiry occurred to the trust estate on account of the original breach of trust, but from a reinvestment of the proceeds. The Master of the Rolls (Lord Longdale) held that "the trustees having without authority procured and accepted in lieu of so much stock, an unauthorized but ample security for so much money, became responsible for any future loss traceable to that first error." That those "who knowingly procured this to be done for their own benefit, ought to be considered as partakers in the breach of trust, and therefore ordered that to Mrs. Fyler, the life tenant, an inquiry must be directed as to her concurrence.

2d. This being demonstrated, the authorities are abundant and explicit that she is estopped from proceeding against her trustee for the consequences of such act or from requiring him to make good any loss resulting from such improper investment.

This is so by concurrence.

Welkinson *v.* Parry, 4 Russ., 272.
White *v.* White, 5 Vesey, 555.
Langford *v.* Gascoyne, 11 Ves., 333.

Fyler *v.* Fyler, 3 Beav., 550.
Byrchall *v.* Bradford, 6 Maddoch, 13.
Nail *v.* Punted, 5 Simmons, 555.
Life Assu. of Scotland *v.* Siddall, 3 De G., F. & J., 58, 74.

This is what the Lord Chief Baron called "a peevish proceeding."

In re Chertsey Market, 6 Price, 284.

And also by subsequent acquiescence.

Griffith *v.* Porter, 25 Beav., 236.
Harden *v.* Parson, 1 Eden, 145.
Hope *v.* Liddell, 21 Beav., 183.
Farrant *v.* Blanchford, 1 De G. J. & S., 107.
Rutherfoord *v.* Maziere, 13 Ir. Ch., 204.
Brice *v.* Stokes, 11 Ves., 319.

Walker *v.* Symonds, 3 Swanston, 64, per ELDON, Lord Chancellor :—"It is established by all the cases that if the *cestui que trust* joins with the trustees in that which is a breach of the trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust. I go farther and argue that either concurrence in the act or acquiescence without original concurrence will release the trustees; but that is only a general rule, and the court must inquire into the circumstances which induced concurrence or acquiescence, recollecting in the conduct of that inquiry how important it is on the one hand to secure the property of the *cestui que trust*; and on the other not to deter men from undertaking trust from the performance of which they seldom obtain either satisfaction or gratitude."

IV.

Not only is Mrs. Jaudon estopped, but the trustee can sue and recover back from her the increased amount of income resulting from this illegal investment so made with her concurrence,

Holland *v.* Hughes, 16 Ves., 114.
Booth *v.* Booth, 1 Beavan, 125.
Denies *v.* Scott, 4 Russ., 195, 1827.

This case presented the extraordinary feature that the remainder man, was benefited by the breach of trust. The testator had invested money in a ten per cent. stock, which the trustees failed to sell, during the life of the tenant for life, when they did sell, the funds were very low, and much lower than they were a year after the testator's death. Notwithstanding the court charged the trustees with the excess of income, over the amount that would have been received had they discharged their duty.

Lincoln *v.* Wright, 4 Beav., 427, 1841.

This was an action against trustees for a breach of trust. The Master of the Rolls, said "a point which has very frequently been the subject of discussion in this court is raised, whether, if they are liable for the whole, they are not at least entitled to be relieved from some portion of their responsibility; because as they allege, the persons who are tenants for life, and some of the persons who have an interest in remainder, acquiesced in that departure, from the strict direction of the will, in consequence of which the loss has been sustained. * * Now nothing can be more clear, than the rule which is adopted by the court, in these cases; that if one party having a partial interest in the trust fund, induces the trustee to depart from the direction of the will, for his own benefit, and enjoys that benefit, he shall not be permitted personally, to enjoy the benefit of the trust, whilst the trustees are subjected

to serious liability which he has brought upon them. What the court does in such a case, is to lay hold of the partial interest, to which that person is entitled, and apply it so far as it will extend, in exoneration of the trustees, who by his request and desire, or acquiescence, or by any other mode of concurrence, have been induced to do the improper act."

McGathen *v.* Dew, 15 Beav., 84, 1851.

These were two suits heard and decided before the Master of the Rolls, together. The first suit was against trustees by remainder man, for breach of trust, in converting stocks, the second by trustees against life tenant, for re-payment to the trust the value of the stock. The life tenant, was father of the remainder man, and had invested the moneys received in breach of the trust, in a house as valuable as the stock disposed of. The Master of the Rolls, regretted the necessity of making the decree, but felt compelled to hold "that the trustees being compelled to replace the fund, are entitled to compel Mr. McGathen, to make good to them the reduced stock sold out. He was aware that it was a breach of trust when he asked it to be done he obtained the benefit of it, and he must make it good," and decreed accordingly.

Hood *v.* Clapham, 19 Beav., 90, 1854.

In this case, a testator directed the sale of certain property, and its investment in public funds, the income to be paid to tenants for life, and with remainder. In violation of duty, the trustees permitted the tenants for life to enjoy the income of the property, as bequeathed by testator, and the Master of the Rolls, finding that by that means, the tenant for life, had been overpaid, compelled the trustees to recoup the over payment,

Raby *v.* Ridgehalgh, 7 DeG., M. and G., 104, 1855.

Trustees, at the instance of a tenant for life, invested trust funds, contrary to law, so as to obtain an increased income, but the tenant did not know of the particular investment which proved insufficient. Held on appeal, affirming the order of the Vice-Chancellor, that the trustees could recoup against the life tenants the amount the trustees had been compelled to pay to the remainder man, for the breach of trust.

This rule applies to a feme covert, entitled to the separate use of the income, if (as in this case,) there is no restraint upon anticipation.

Lewin on Trusts, 657.

V.

The appellant has the right to avail itself of this question of title as a defence to the complainant's claim, and such claim is defeated if the foregoing argument is sound.

It was suggested by the Court below that the appellant could not shield itself from the legitimate consequences of its own acts by criticising the conduct of the appellee, and on this theory, as we understand it, gave judgment for the complainant.

This determination was erroneous.

1st. Because the complainant's bill in equity alleged complainant's interest in the said stock, as the very foundation of her cause of action, and in equity suitors must succeed *secundum allegata et probata.*

2d. Because in fact such right, title and interest in

said stock was necessary to give the complainant any standing in Court. Her mere assertion of such right gave her no standing, and the appellant herein challenged the complainant's right or interest in said stock, and so it became the fundamental question. Without establishing that right, she stands only as a volunteer.

3d. Because it would violate the sound maxims of equity, that no one shall take advantage of his own wrong, that where both parties are guilty, the defendant has the better position, and that equity will entertain no suit arising from wrong.

4th. Because the appellant has done nothing by which it is estopped from proving or taking advantage of the facts, as they existed in reference to this stock. A stranger can neither take advantage of an estoppel nor be bound by it 1 Taylor Ev. 6th ed. p. 118

VI.

Conceding, for the purpose of argument, that the claim put forth by the respondent is enforceable in a Court of Equity, nevertheless the judgment of the Court below is erroneous, and should be reversed, for the appellant, with knowledge of the trust as it is claimed to exist as to this stock by the respondent, had a legal right to deal with the trustee in respect thereto.

1st. It is conceded, as we understand, that the appellant had no knowledge of or participation in the use made by the trustee of the money realised by him upon this stock.

2d. The act of the appellant was the act of a pur-

chaser, and it in law had the rights of a purchaser.

Purchaser includes one who *advances money*, or incurs responsibility upon credit of property.

Crocker *v.* Crocker, 31 N. Y., 507.

3d. The legal title to the stock being in the trustee, the appellant could lawfully deal with him in respect thereto, without incurring any responsibility for its conduct, either to the life tenant or the remainder man.

See cases cited by counsel for Duncan, Sherman & Co. on their Points, in reference to this stock.

4th. Otherwise this state of things might result—the trustee sells the canal stock and buys coal stock. Mrs. Jaudon ratifies the first conversion, so far as she may, and repudiates the second; the Court enables her to throw the loss upon the appellant, and the amount is restored to the fund, and again illegally invested by the trustee with her assent, and the money is again sunk in an unfortunate investment; then the remainder man comes in and repudiates the first conversion, and compels a restoration of the original Pennsylvania fives to the trust, whereby the gains enure to the benefit of the *cestuis que trust*, and the losses fall upon innocent parties.

The assent of Mrs. Jaudon no more binds the remainder man than the act of the trustee binds her.

5th. Viewed in another aspect, the decision of the Court below is contrary to the general policy of the law. It unjustly hampers the free transmission of property, and as in Bacon *v.* Albertson, 24 N.Y., 605, Porter, J., truly and eloquently says, "the "free alien ability of property is as essential to "the healthful condition of a state, as the flowing

" of the tides to the purity of the sea, or the circu-
" lation of the blood, to animal life. " And as Rapallo, J. says in McNeil *vs.* the Tenth National Bank, 46 N. Y., 339, " the legal title to shares in " corporations is capable of being transferred " by assignment, and the free transmission which " from hand to hand is essential to the prosperity of a commercial people."

VII.

In no event can the respondent claim or recover for more than ninety-three shares, for of the whole 117 shares only 93 belonged to the trust, and the title to the remainder vested in Samuel Jaudon by consent of Mrs. Jaudon.

1st. By the provisions of the will, the absolute legal title to the twenty-eight shares that had been held in trust for the widow, became, on her decease vested in the complainant.

By the will (fol. 235), the stocks and funds held for her share were to be, upon the decease of the widow, equally divided, share and share alike, between the testator's daughters, " the trust to remain the same for their sole use and benefit," but the only trust created, and which was to remain, was a trust for the life of his wife. In case of the death of any daughter, during his wife's life, the children of such deceased daughter are to have the portion which their parent would have been entitled to by this request. It is clear that the testator intended that the grandchildren should take an absolute, unqualified fee, and this construction can only be arrived at by holding that

the parent of such grandchildren, if living, would have been entitled to such portion, for the grandchildren, children of a deceased daughter, can only take the portion which their parent would have been entitled to.

2d. The amount originally held for Mrs. Jaudon was 93 shares, and on the death of her mother there came 28 shares additional (fol. 205), and this additional 28 shares was part of the amount hypothecated to the appellant (fol. 131). These 28 shares having become the absolute property of Mrs. Jaudon, ceased to be part of the trust estate set forth in the bill in equity herein, and as to that there can be no recovery. So that if the Court should hold with the Court below as to any part of this case, instead of allowing the complainant to recover of appellant for 45 shares, it can only be for 17 shares, and no more. The title to the remaining shares vested absolutely in Samuel Jaudon, with the consent of the appellee.

VIII.

The decree appealed from should be reversed, and a *venire de novo* awarded, with costs.

ARNOUX, RITCH & WOODFORD,
Solrs. for Applt.

WM. HENRY ARNOUX,
Of Counsel.

W. W. Mac Farland
& Counsel.

E. Tompkins, Printer, 16 Cedar Street, New York.

Supreme Court

OF THE UNITED STATES.

WILLIAM B. DUNCAN, DAVID DUNCAN, and WILLIAM WATTS SHERMAN,
Appellants.

vs.

MARY T. B. JAUDON,
Appellee.

Brief for Complainant, the Appellee.

THE NATIONAL CITY BANK,
Appellant.

vs.

MARY T. B. JAUDON,
Appellee.

ABSTRACT OF THE BILL OF COMPLAINT.

The complainant is a resident of the city of Philadelphia, and a citizen of the State of Pennsylvania, (fol. 3).

1. The defendants, Samuel Jaudon, William B. Duncan, David Duncan and William Watts Sherman, are residents of the city of New York, and citizens of the

State of New York, doing business in the city of New York under the firm name of Duncan, Sherman & Co., (fol. 3).

The defendant, The National City Bank, is a banking association under an act of Congress, and a resident of the city of New York, and a citizen of the State of New York, (fol. 3).

The defendant, Charles B. Jaudon, is a resident of the city of Philadelphia, and a citizen of the State of Pennsylvania, (fol. 3).

2. The complainant is the wife of the defendant, Charles B. Jaudon, and has a separate estate; she is a daughter of the late Commodore Bainbridge, of Philadelphia, who died in 1833, leaving a will, proved in the office of the Register of Wills in Philadelphia, on the 2d of August, 1833, (fols. 3, 4).

3. The testator in his will after bequeathing certain specific legacies, appointed William Lynch and Hugh Calhoun trustees of the residue of his estate, and, amongst other things, directed them to invest a portion thereof in trust, the interest whereof to be paid to my daughter, Mary T. Bainbridge, the complainant, "for her sole use and benefit, during her natural life, and at the end of her natural life, the amount so invested to be equally divided between her children," (fol. 4).

4. The said trustees, were afterwards on their own petition discharged from their trust, and on the 29th of May, 1835, the defendant, Samuel Jaudon, was appointed by the Court of Common Pleas of the city and county of Philadelphia, as trustee in their stead under the will, (fol. 4).

5. The said Samuel Jaudon, has since acted as, and still continues to be such trustee; and, as such, held, on or about 21st of October, 1867, amongst other things 117 shares of the stock of the Delaware & Raritan Canal Com-

pany of the par value of $100 per share, and of the actual value of over $14,000, (fol. 5).

These shares were entered and stood upon the books of said Company, in the name of Samuel Jaudon, as trustee of complainant, and certificates were issued to him for said shares, showing on their face that they were issued to him as her trustee, (fol. 5.)

6. Said Samuel Jaudon, also held previous to, and on, or about the 15th of June, 1868. as the trustee of the complainant, $5,600, of the U. S. loans, commonly called "five twenties," with interest coupons after that date attached of the value of more than $6,800, (fol. 5).

7. After the said U. S. loans came into his hands, the date is unknown to the complainant, the said trustee, in breach of his trust, and without the knowledge or consent of the complainant, disposed of the whole amount of the said U. S. loans, with the coupons attached and misappropriated the proceeds to his own use, then amounting to, and of the value of more than $6,800, (fols. 5, 6).

8. In the latter part of 1867, the said Samuel Jaudon, by the aid of the defendants, Duncan Sherman & Co., and the National City Bank, those defendants being at the time informed of the fact that he held the said shares of the Delaware & Raritan Canal Company stock as the trustee of the complainant, contrary to his duties as such trustee, and in breach of his trust disposed of and misapplied the said shares of stock, then being of the value as aforesaid, for his own benefit, and, as to the greater part thereof, to the advantage and gain of those defendants, (fol 6).

9. At some time believed by the complainant to be in October, 1867, but, as to which, she prays the defendants may answer, the said Samuel Jaudon pledged, or hypothecated with the said Duncan, Sherman & Co., a certificate or certificates, for 70 shares, or thereabouts, of said stock, held by him as trustee for the complainant, and issued

to him in his name as such trustee, as security for the repayment to Duncan, Sherman & Co. of money then or previously loaned, or furnished by them to the said Samuel Jaudon on his individual account, (fols. 6, 7).

The certificates showed on their face that the shares of stock were not the property of the said Samuel Jaudon in his own right, but were held by him in trust for the complainant; and the said Duncan, Sherman & Co. were bound to know he had no right to pledge or dispose of them for his private benefit or use, (fol. 7).

Afterwards, the complainant is not able to name the precise date, but prays the defendants may answer; the shares of stock last mentioned, were sold, or caused, or permitted to be sold by the said Duncan, Sherman & Co., to some person, or persons, to the complainant unknown; and the proceeds thereof were applied with the knowledge of the said Duncan, Sherman & Co., that they were so produced, to extinguish the said private indebtedness of the said Samuel Jaudon to them, (fol. 7).

That the said 70 shares, or thereabouts, of the said stock, were then of the value of more than $9,000, (fol. 7).

10. On, or about the 5th of December, 1867, the Complainant believes this to be the date but asks that the defendants shall answer thereto particularly, the said Samuel Jaudon pledged, or hypothecated with the said The National City Bank, a certificate, or certificates of 47 shares, or thereabouts, of the said stock held by him and in his name as trustee of the complainant, as security for the repayment to said bank of moneys then, or previously loaned, or furnished, by the said bank, to the said Samuel Jaudon, on his individual account, (fol. 8).

The certificates showed upon their face, that the shares of stock were not the property of the said Samuel Jaudon in his own right, but were held in trust for the complainant, and the said bank was bound to know he had no right to pledge, or dispose of them for his own private benefit and use, (fol. 8).

At a subsequent date unknown to the complainant, as to which she prays the defendants may answer, the shares of stock last mentioned were by the said bank sold, or caused, or permitted to be sold, and transferred to some person unknown to the complainant, and the proceeds were applied, with the knowledge of the bank, that they were so produced, to extinguish the said private indebtedness of said Samuel Jaudon, to the said bank. That the said shares of stock were then of the value of more than $6.000, (fols. 8, 9).

11. That the matter in dispute herein, exceeds $20,000 besides costs, (fol. 9).

12. The statements in paragraphs 8, 9, 10 are made upon information and belief, (fol. 9).

13. The complainant has demanded of the said Duncan, Sherman & Co., that the said 70 shares, or thereabouts of Delaware & Raritan Canal Company stock, be restored to the said trust, together with all dividends since declared thereon, or that they pay the value of said stock and dividends with interest; and also demanded of said bank, that the said 47 shares of like stock, be restored to the said trust, together with all dividends since declared thereon, or that it pay the value of said stock and dividends with interest; each of which the said firm and said bank refused to do, (fol. 9).

14. Answers on oath to several interrogatories are required, (fol. 10).

1. Whether the said Samuel Jaudon pledged or hypothecated with the said Duncan, Sherman & Co., a certificate, or certificates for part of the said shares of stock of the Delaware & Raritan Canal Company, to wit, 70 or thereabouts, or any number, whether the number was 70 or thereabouts, stating the number, and whether they were so pledged or hypothecated in 1867, if not, when, stating the time, (fol. 10).

2. Whether the certificates purported to have been is-

sued to the said Samuel Jaudon in his name as trustee for Mrs. Mary T. B. Jaudon, and, if not, state how otherwise, (fol. 10.)

3. Whether said Samuel Jaudon pledged, or hypothecated the certificate, or certificates to Duncan, Sherman & Co., as security for the payment to the firm of moneys, loaned, or furnished by them to the said Samuel Jaudon, and if not, how otherwise.

4. Whether said moneys were loaned, or furnished in October, 1867, and when, stating items and dates particularly, and to whom, and upon whose account, (fol. 11.)

5. Whether the certificate, or certificates showed upon their face, that the shares of stock were held by the said Samuel Jaudon in trust for any person; if so, for whom (fol. 11).

6. Whether Duncan, Sherman, & Co., did sell, or cause or permit to be sold &c., the said shares of stock, if so, to whom, for what amount, how were the proceeds applied, were they applied to an indebtedness of Samuel Jaudon, when was that indebtedness contracted, or how otherwise were they applied, (fols. 11, 12).

7. Whether the said Samuel Jaudon pledged or hypothecated with said bank, a certificate or certificates for 47 shares, or thereabouts, of the Delaware & Raritan Canal Company stock, or any number, if so, the number and what time, (fol 11).

8. Whether the certificate, or certificates purported to have been issued to the said Samuel Jaudon in his own name, as trustee for Mrs. Mary T. B. Jaudon or how otherwise, (fol. 12).

9. Whether the said Samuel Jaudon pledged, or hypothecated the certificate, or certificates, to the said bank as security for the payment to the bank of money loaned, or furnished by the bank, to the said Samuel Jaudon, or how otherwise, (fol. 12).

10. Whether the moneys were loaned, or furnished about the 5th of December, 1867, and when they were so loaned or furnished, state items and dates, particularly, to whom and upon whose account, (fol. 12.)

11. Whether the certificate, or certificates showed upon their face, that the shares of stock were held by the said Samuel Jaudon in trust for any person, if so, for whom, (fol. 12).

12, Whether the bank did sell, or cause or permit to be sold or transferred the said shares of stock, if so, to whom they were sold or disposed of, for what sum, how were the proceeds applied, were they applied to an indebtedness of the said Samuel Jaudon, when was that indebtedness contracted, or how otherwise were they applied, (fols. 12, 13).

13. And that the said Samuel Jaudon so answer, whether in breach of the trust reposed in him, and without the knowledge or consent of complainant, he disposed of the said $5,600, or any, or what amount of loans of the U. S., commonly called 5'20's with the coupons attached, and misappropriated the proceeds, &c., stating the times and sums, (fol. 13).

The complainant prays for relief.

1. That the defendant, Samuel Jaudon, may be ordered to account for the value of the U. S. securities, with all interest received, or that he might have received, also for the value of the 117 shares of stock, with all dividends; that he may be decreed to restore the loans and stock to the trust, or to pay the value thereof, with all profits and interest, into Court, subject to its disposition and control; which value complainant believes exceeds $22,000 (fol. 13).

2. That the defendants, Duncan, Sherman & Co., be decreed to account for, and restore to the trust, the said shares of stock hypothecated with them, and subsequently

sold, with all dividends and interest, or to pay the value thereof, into Court, which complainant believes exceeds $10,000, (fol. 14).

3. That the defendants, The National City Bank, be decreed to account for, and restore to the trust, the said shares of stock, hypothecated with them, and subsequently sold, with all dividends since declared, or to pay the value into Court, which complainant believes exceeds $6,600, (fol. 14).

4. That the defendant, Samuel Jaudon, be dismissed from his trust and another trustee appointed, (fol 14).

5. Also for general relief, (fol. 15).

DEMURRERS.

The defendants, Duncan, Sherman & Co., and the National City Bank, respectively demurred to the bill, for multifariousness, want of necessary parties, and of capacity of the complainant to sue (fols. 27–33) which demurrers after argument before the Court, His Honor Judge Blatchford presiding, were overruled, with leave to those defendants to answer (fols. 41, 42.)

ANSWERS.

ANSWER *of William B. Duncan, David Duncan, and William Watts Sherman.*

Fol. 45. They say that on or about the 18th July, 1867, Samuel Jaudon applied to them at their banking house in the City of New York, in the regular course of business, for a loan of $7,000, and offered as security therefor 70 shares of the stock of the Delaware and Raritan Canal Company (fol. 45).

The application for said loan was made to the defendant, William B. Duncan, in person, who knowing the value of the stock, and knowing the security offered to be sufficient, directed the loan to be made, and thereupon the certificates of the said shares of stock, having en-

dorsed thereon a power of attorney in the usual form to transfer, duly executed by the said Samuel Jaudon, were handed to one of the clerks in the banking house of these defendants, and the sum of $7,000 advanced to the said Jaudon upon the pledge and security thereof. These defendants, nor either of them made a careful examination of the said certificates, and did not observe, and had no knowledge that the same were issued to the said Samuel Jaudon, as Trustee, as in the plaintiff's bill is alleged, but these defendants have been informed, and believe the fact to be, that the said certificates of stock were issued to the said Samuel Jaudon, as in the plaintiff's bill is charged, and that it appeared upon the face thereof that they were so issued (fol. 46).

Afterwards the 16th day of October, 1867, these defendants loaned to the said Samuel Jaudon, the further sum of $600 upon the security of the said stock making, in all $7,600 so loaned (fol. 46).

The said stock was sold by these defendants, on or about the 21st day of October, by the direction of the said Samuel Jaudon in the regular course of business; the amount realized therefor was $8,699.12, by the like direction of the said Samuel Jaudon, the amount loaned to him upon the security of the said stock, as aforesaid, amounting with interest to $7,729.88, was deducted from the said proceeds, leaving a balance due to the said Samuel Jaudon of $969.24, which on the day last aforesaid was paid to him by these defendants (fol. 47).

That the defendants had not at any time, and have not, any knowledge or information of any actual or intended breach of trust on the part of the said Samuel Jaudon in dealing as aforesaid with the said stock, nor did they have any reason to believe that any such breach of trust had been, or would be, committed by the said Samuel Jaudon, and save as hereinbefore stated, these defendants respectively, have no knowledge or information in the premises whatever; and they respectively insist that they are bona fide purchasers of the said stock

for a good and valuable consideration, without any notice of actual or intended breach of trust on the part of the said trustee, and without any other notice of the existence of any trust whatever, except so far, and so far only, as notice is to be imputed to them by law, upon the facts herein before stated (fol. 47).

These defendants pray the same benefit, as if the facts alleged in the answer had been pleaded in bar; deny combination and confederacy, and conclude with the usual traverse.

The answer is verified by the defendant, William B. Duncan.

ANSWER *of the National City Bank.* (Fol. 51.)

1. They admit they are a banking association, created and organized under an Act of Congress of the United States, and a citizen and resident of the State of New York, doing business in the City of New York (fol. 51).

2. They say that they know not, and have not been informed, save by the complainant's bill, and cannot set forth as to their belief, or otherwise, whether the complainant is, or is not, the wife of Charles B. Jaudon, and has or owns a separate estate, &c., or that she is the daughter of the late Commodore Bainbridge, of the City of Philadelphia, or that he died in 1833 (fol. 51).

3. Or whether he left a will, which was duly proved in the office of the Register of Wills, in and for the City and County of Philadelphia, on the 2d day of August, 1833, &c., or that said will appointed the Trustees, or contained the directions in the complainant's bill set forth (fol. 52).

4. Or whether the Trustees, who were named in said will, were at any time, on their own petition or otherwise, discharged from their trust, or whether the defendant, Samuel Jaudon, on the 29th May, 1835, or at any other

time, was appointed a Trustee in their stead, under the said will, &c. (fol. 52).

5. Or whether the said Samuel Jaudon, since his alleged appointment, has acted as, and still continues to be the Trustee of the complainant; or whether he, as such Trustee or otherwise, held on or about the 21st October, 1867, for her benefit, 117 shares of stock of the Delaware & Raritan Canal Company, or whether said stock was of the par value of $100 each share, or whether the actual value thereof was over $14,000; or whether these shares were entered and stood on the books of said company, in the name of said Samuel Jaudon as trustee of the complainant, or whether a certificate or certificates was issued or delivered to him for the said shares, showing on their face, that they were issued to him as her trustee, &c. (fol. 53).

6. Or whether the said Samuel Jaudon did, or did not hold, previous to on or about June 15th, 1868 or at any other time, as trustee of the complainant, and for her benefit, $5,600, or any other amount of the United States loans called 5.20's, or any other loan, with the interest coupons due after said last-mentioned date, or any other interest coupons still attached thereto, of the value of $6,800, or any other value, &c. (fol. 54).

7. Or whether the said Samuel Jaudon did or did not, in breach of the trust reposed in him, and without the knowledge or consent of the complainant, or otherwise dispose of the whole, or any part of the said United States loans, or whether he did or did not misappropriate the proceeds thereof, or any part thereof to his own use, &c. (fol. 54).

8. These defendants deny that in the latter part of 1867, or at any other time, the said Samuel Jaudon, by the aid of Duncan, Sherman & Co., and these defendants, or by the aid of either of them, contrary to his duties as trustee or otherwise, or in breach of his trust or otherwise, disposed of and misapplied the said shares of stock,

or any part thereof for his own benefit, or the advantage and gain of Duncan, Sherman & Co. or these defendants or either of them. And these defendants deny that said Samuel Jaudon informed these defendants at the time alleged, or at any time, that he had the said shares of stock as the sole trustee of the complainant (fol. 55).

9. These defendants know not, and have not been informed, save by the complainant's bill, and cannot set forth upon their information or belief, whether the matters alleged in the 9th paragraph of the bill are or are not true, &c. (fol. 55).

10. These defendants admit that the said Samuel Jaudon, pledged or hypothecated with these defendants, a certificate of 47 shares of stock of the said Delaware & Raritan Canal Company, and that such certificate showed upon its face that the shares of stock were not the property of the said Samuel Jaudon in his own right, and that such shares were hypothecated on or about October 21st, 1866, and that on or about 14th January, 1867, the said shares of stock were by these defendants sold, or caused or permitted to be sold—these defendants deny the loan was made by them to the said Samuel Jaudon on his individual account (fols. 55, 56).

They deny that they were bound to know the said Samuel Jaudon had no right to pledge or dispose of said shares for his own private benefit or use. They deny they transferred the shares to any person, &c. They allege that at the time of the delivery of said certificate of stock to them by said Jaudon, and a consideration therefor, and other good considerations, they paid to said Samuel Jaudon $9,500, and they are informed and believe said moneys were paid, laid out and expended by said Samuel Jaudon, for and on behalf of the purposes of the trust for which he held the same, that before such subsequent date they duly demanded the repayment to them of said moneys so paid by them to said Jaudon, who failed to repay the same, and thereupon, on said last-mentioned day they, with the consent and under the direction

of said Samuel Jaudon, caused the same to be sold, and reimbursed themselves, and repaid to said Samuel Jaudon whatever surplus remained; that such certificate of stock had a power of attorney endorsed signed by said Samuel Jaudon, trustee, and they thereupon delivered said certificate so endorsed and signed, and the stock was transferred directly from said Samuel Jaudon, trustee, to such purchaser (fols. 56, 57).

They deny said shares of stock were of the value of more than $6,000, or that the same exceeded in value $5,000 (fol. 57).

11. These defendants know not, &c., whether the matters alleged in the 11th paragraph of the bill are or are not true, except as hereinbefore set forth (fol. 57.)

12. They admit the demand alleged in the bill, that the defendants restore the said shares of the stock to said trust, together with all dividends, &c., or that they pay the value thereof, and that they refused to comply (fol. 57).

13. These defendants answer the several interrogatories as follows:

To the 7th they say: that the said Samuel Jaudon did pledge or hypothecate with these defendants, a certificate for shares of Delaware & Raritan Canal Company stock, to wit, 47 shares, and that said shares wre hypothecated the 21st October, 1866 (fol. 58).

To the 8th they say: that the said certificate purported to have been issued to said Samuel Jaudon in his name as trustee (fol. 58).

To the 9th they say: that the said Samuel Jaudon pledged and hypothecated said certificates to the said bank, as security for the repayment to said bank of noneys loaned, or furnished by them, to the said Samuel Jaudon (fol. 58).

To the 10th they say: that the said moneys were

loaned or furnished, about the 21st October, 1866; that the whole amount so loaned to said Samuel Jaudon was $9,500: that the same was loaned in one sum on said last mentioned day, that the same was loaned to said Samuel Jaudon, and that such loan was made upon the account of the said certificate of said stock, and other valuable considerations, which was at the time and place of making loan, and as consideration therefor, delivered to these defendants (fol. 58.)

To the 11th they say: that the said certificate did show on its face that the said shares of stock were held by said Samuel Jaudon in trust, and that upon their face they did not show who was the person for whom they were held in trust, and these defendants were not informed and did not know; for whom said shares were held by said Samuel Jaudon (fol. 59).

To the 12th they say that the bank did cause to be sold the said shares of stock through Drexel, Winthrop & Co., stock brokers; they never knew and are not able to state to whom they were then sold or disposed of, and are unable to state for how much the same were sold; that the proceeds were applied to the repayment of said loan, with interest (fol. 59).

14. These defendants, save and except as hereinbefore stated to the contrary, have no knowledge or information in the premises whatever, and they allege and insist they are *bona fide* purchasers of said stock for a good and valuable consideration without any notice or knowledge of the rights of the complainant therein, and without any notice of any actual or intended breach of trust on the part of said trustee, and without any other notice of the existence of any trust whatever, except so far as notice may be imputed to them by law upon the facts hereinbefore stated (fols. 59, 60).

15. These defendants pray the same benefit, &c., as if they had pleaded the facts in bar (fol. 60).

16. These defendants deny all unlawful combination, &c., with the usual traverse (fol. 60).

The answer is verified by B. Cartwright, Cashier of the Bank (fol. 61).

ANSWER *of Charles B. Jaudon*—admitting the bill (fol. 39).

Order pro confesso taken as to the defendant *Samuel Jaudon* (fol. 43).

REPLICATIONS.

The complainant filed and served general replications to the several answers (fols. 63, 65).

PROOFS.

The complainant is the wife of the defendant, Charles B. Jaudon, and has, and owns, a separate estate. She is a daughter of the late Commodore Bainbridge, of Philadelphia, who died in 1833, leaving a will (fols. 132 to 135, 191, 192).

An exemplified copy of the will is in evidence, recorded, upon being proved, in the office of the Register of Wills in Philadelphia, August 2, 1833. (Exhibit No. 1, Sept. 20, 1870, fol. 229).

Reference is made to the clause numbered "Fifteenthly" (fols. 232, 233), the next following clauses, marked "First," "Secondly," "Fourthly," as especially pertinent in this case (fols. 233 to 235). The entire contents of the will should be read in order to see the provisions made for the widow and sister of the testator and three daughters, besides the complainant—all being beneficiaries in the trusts created.

The trustees named in the will were, on their own petition, discharged from their trust by the Court of Common Pleas in Philadelphia in May, 1835, and the defendant,

Samuel Jaudon, was then appointed by that Court a trustee in their stead.

An exemplified copy of the record of these proceedings is in evidence (Exhibit No. 2, Sept. 20, 1870, fols. 245 to 251.

At the death of the testator, Commodore Bainbridge, the bulk of his estate was invested in "Pennsylvania Fives," or "Pennsylvania Five Per Cents." The residue of his estate consisted principally of some "Philadelphia City Loans" and some "Ohio Loans" and a house and lot (complainant's test., fols. 198, 207, 208, 200, 212; test. S. Jaudon, fols. 150 to 153).

No change was made of the investments of the estate, as they existed at the death of the testator, by the trustees named in the will (complainant's test., fols. 198, 199, 201).

Soon after those trustees had obtained their discharge from the trust, and the defendant, Samuel Jaudon, was appointed in their place, he sold the "Pennsylvania Fives" and invested the proceeds in the stock of "The Delaware and Raritan Canal Company" (complainant's tes., fols. 201 to 203, 218; tes. S. Jaudon, fols. 134, 150 to 153).

This stock was apportioned by the trustee among the several beneficiaries in the trust, and the number of shares allotted to the complainant was 93. The trustee retained in his hands the stock, but the complainant subsequently received the income of that number of shares (complainant's tes., fols. 194, 195, 204, 205, 206; tes. S. Jaudon, fols. 150 to 153).

The change of the investment from the "Pennsylvania Fives" to "The Delaware and Raritan Canal Company" stock was made without any consultation with, or any previous knowledge of, the complainant; but she, on learning of it, gave it her approval, understanding it to have been advised by the executors, and believing it

to be wise and beneficial to her (complainant's tes., fols. 199 to 202, 205, 207, 208, 219).

The amount paid for "The Delaware and Raritan Canal Company" stock was about $135 each share, being $35 premium above the par value of $100 a share (complainant's tes., fol. 222; tes. S. Jaudon, folios 152, 153).

In 1857 the widow of the testator died, and soon after a division of "The Delaware & Raritan Canal Company" stock, held by the defendant, Samuel Jaudon, as trustee for the widow, of the $28,000 for life, &c., was made between the four daughters of the testator, including the complainant, upon which division 28 shares were allotted to the complainant, and that number added to the 93 shares previously allotted to her under the will, made a total of 121 shares. All the shares were retained in the hands of the trustee; but the income of them was paid, from time to time, to the complainant (complainant's tes., fols. 194, 195, 204, 205, 211, 212, 215).

Afterwards the house and lot were sold for $10,000, some of the proceeds of which were placed in U. S. Government Securities, first 7-30s, and next 5-20s (complainant's tes., fols. 193, 206, 213, 214, 215, 220).

On the 16th of October, 1865, the defendant, Samuel Jaudon, applied to the defendants, The National City Bank, for a loan of $6,000, upon the security of a pledge or hypothecation of the 47 shares of The Delaware & Raritan Canal Company stock, and the bank made the loan to him (tes. of B. Cartwright, fols. 77, 79, 91 to 98, 102 to 106, 149; test. S. Jaudon, fols. 142 to 148, 161 to 164; see also the answer of the bank, fols. 55 to 60).

On the 27th November, 1865, the bank loaned to the said Samuel Jaudon, upon the same securities with others, $3,500 (test. B. Cartwright, fols. 71 to 81, 90 to 97, 102 to 106; test. S. Jaudon, fols. 142 to 147).

Loans of this character were entered in a book of the bank, entitled "Debit and General Ledger," and the

payment thereof, and of the interest, in another book of the bank, entitled "Note Book," the principal sum being entered in both books, under the tite of "Notes Receivable," and the payments under the title of "Interest Account" (test. B. Cartwright, fols. 103 to 106).

These loans in question were entered in the "Debit Cash Book," "Monday, October 16, 1865, Notes Receivble loaned to S. Jaudon, 6—" (indicating $6,000); "Monday, November 27, 1865, Notes Receivable loaned to S. Jaudon, $3,500." In the "Note Book" the entries were "Saturday, December 30, 1865, interest account, S. Jaudon, $224.19;" "Wednesday, January 17, 1866, Notes Receivable, S. Jaudon, Tr., $9,500; interest account, S. Jaudon, Tr., $31.41" (test. B. Cartwright, fols. 103 to 106.

Entries of successive similar loans of $9,500 to S. Jaudon, and payments made by him of all but the last, appear upon the books up to and including October 12, 1867, the number of the loans subsequent to the first two being 8 (test B. Cartwright, fols. 103 to 106; S. Jaudon, fols. 142 to 147).

The 47 shares of the Delaware & Raritan Canal Company stock, were in all those loans; every time he took up a loan, the securities were returned to him (test. B. Cartwright, fols. 94, 95).

These loans were all of the same character (test. B. Cartwright, fols. 76 to 81).

The collaterals were not entered in a book, only on a an envelope containing them (test. B. Cartwright, fols. 97, 98).

As to the character of the loans, as to being renewals, or payments, &c. (test. B. Cartwright, fols. 79 to 90, 91 to 94; test. S. Jaudon, fols. 142 to 147).

In respect to the last loan, the bank called upon S. Jaudon to pay it, and he gave the bank a verbal order to sell the stock. It was sold December 10, 1867, for

$5,897.90, nett, and in January, 1867, the proceeds were applied to pay the loan. There was a balance coming to him (test. B. Cartwright, fols. 88 to 91).

As to instruction to sell the collaterals (test. B. Cartwright, fols. 100, 101; S. Jaudon, fols. 136, 137, 141, 142).

The certificates of stock for 28 and 19 shares, copies of which are set forth in the testimony of Francis S. Conover, are identified by the defendant, S. Jaudon, as the certificates pledged by him as collateral to the loans from the defendants, The National City Bank (test. S. Jaudon, fols. 129 to 132).

On the 18th July, 1867, the defendant, S. Jaudon, applied to the defendants, Duncan, Sherman & Co., for a loan, upon a pledge or hypothecation as security, of the 70 shares of the Delaware & Raritan Canal Company stock, which was made to him. The amount of the loan originally was $7,000. It was increased on the 16th October following by an addition of $600, making $7,600 principal (test. S. Jaudon, fols. 136, 164).

On or about the 18th October, 1867, the said S. Jaudon, being unable to pay the loan, stated to the firm that the only way he knew to pay it was to sell the stock (test. S. Jaudon, fols. 137, 141).

The amount of these loans, including interest, on the 21st October, 1867, was $7,729.88, and on that day, the firm having sold the stock, accounted to S. Jaudon for the stock $8,699.12, and paid to him the balance, $929.64 (test. S. Jaudon, fols. 142, 164, 165).

The certificate of stock in the Delaware & Raritan Canal Company for 70 shares, on the pledge of which, as collateral, the loans by Duncan, Sherman & Co. to S. Jaudon were made, is identified by the defendant, S. Jaudon, in his testimony, as the certificate for 70 shares, a copy of which is set forth in the testimony of Francis S. Conover (test. S. Jaudon, fols. 129, 130).

After the sales of the stock by the defendants, The National City Bank and Duncan, Sherman & Co., the defendant, S. Jaudon, paid as dividends on the stocks to the complainant, in February, 1868, the full sum, and in August, 1868, towards the dividends of that month, $205 (test. complainant, fol. 197; test. S. Jaudon, fols. 158, 159).

Aside from this, the defendant, S. Jaudon, has not restored to the trust or paid complainant anything on account of the stocks (test. S. Jaudan, fol. 169).

The complainant had no knowledge or information whatever of the loans, or the pledges of the stocks, until in December, 1868, long after the stock had been sold (test. complainant, fols. 196, 197, 213, 214; test. S. Jaudon, fols. 138, 158, 159, 168, 169).

She never authorized or consented to a sale, pledge, or other disposition of the investment in The Delaware & Raritan Canal Company stock; was never consulted about it; never approved of it; her consent was never asked or given (test. complainant, fols. 195, 196, 197; test. S. Jaudon, fols. 166, 167, 170, 171).

The loans of the National City Bank, and Duncan, Sherman & Co. were made and used to pay indebtedness of the defendant, Samuel Jaudon, contracted in the purchase of "Broad Top Coal Stock," from which he anticipated large returns; and which he intended, in case his expectations should be realized, to offer to the complainant; and hoped thereby to surprise her, in view of the great value of the security. (Test. S. Jaudon, fols. 138, 139, 140, 147, 148, 149, 168.)

The complainant had no interest in the "Broad Top Coal Stock," and no knowledge of S. Jaudon's intentions respecting it. It proved a total loss, and never was offered to the complainant. (Test. S. Jaudon, fols. 140, 141, 149, 168).

The loans were made in the individual name of

Samuel Jaudon; the "Broad Top Coal Stock" was purchased and held in his individual name. (Test. S. Jaudon, fols. 139, 140, 147).

In making the loans of Duncan, Sherman & Co., the defendant, Samuel Jaudon, said to them something about his not wanting a loan but for a short time, because he had a large property in the "Broad Top Coal Company," which he believed was very reliable; the company was about in operation, and he expected it to turn out a very productive and highly remunerative property. (Test. S. Jaudon, fol. 137. Test. W. B. Duncan, fols. 8, 127, 128).

It was sought by the defendants, The National City Bank, and Duncan, Sherman & Co., to show by the testimony of the complainant and the defendant, Samuel Jaudon, that the complainant had authorized Samuel Jaudon to make changes in the investments; but the testimony of the complainant is directly to the contrary, with a single exception.

Some few years before 1857, Samuel Jaudon invested some of the funds he held as trustee for the several beneficiaries, in some coal stock, named "The Dauphin," to the amount of a few thousand dollars. The complainant, through her brother-in-law, Ashville G. Jaudon, or the defendant, Samuel Jaudon, about the same time invested of her funds, with her consent, in the like stock, to about $4,000. These investments proved a total loss. (Test. of the complainant, fols. 195 to 198).

The executors of the trust attended to the investments. (Test. complainant, fols. 199 to 202, 206 to 212, 218 to 225).

The complainant stated in substance, repeatedly, that the investment of the trust funds was left with the executors; but subsequen ly explained that what she meant by it was that she presumed they had the settlement of the estate, and that they would do it legally and properly. "I was not consulted about it, that is all I mean." (Test. of complainant, fols. 218 to 225).

The only changes made in investments of which the complainant had knowledge, were from "Pennsylvania Fives" into Delaware and Raritan Canal Company Stock, the Philadelphia and Ohio stock into the "Dauphin" stock, and the purchase of the $5,600 Government securities. (Test. of complainant, fol. 213).

The defendant, Samuel Jaudon, testified to an understanding he had before his appointment as trustee, that his appointment was desired with a view to making a change of the investment in the "Pennsylvania Fives" to something more profitable, but could not state any definite conversation with any one to that effect; he also testified to an understanding by him afterwards, that he might make changes when he could do it for something more profitable, but could not testify to any conversation with any one warranting it. Much of his testimony was taken under objection that it stated mere understanding, conclusions, without giving conversations. In regard to a change of the investment made by him in the Delaware & Raritan Canal Company stock, he testified that it was never talked about or contemplated, and that the complainant was not informed, and did not know, that he had pledged the stock until after a sale of it by the pledgees. (Test. S. Jaudon, fols. 153 to 159, 166 to 169 to 176).

He testified there was not in fact any absolute re-investment of the investment in the Delaware & Raritan Canal Company stock. (Test S. Jaudon, fols. 168, 169).

Four of the shares of the Delaware & Raritan Canal Company stock, allotted to the complainant, and held by the defendant, Samuel Jaudon, as trustee, were sold by him without her knowledge and consent, and the proceeds converted by him, in February, 1868. (Test. complainant, fols. 212, 215.

As to demands by the complainant of the trustee, that he pay for the stock or restore it, or the value, to the trust (see test. of Samuel Jaudon, fols. 146, 147).

The Delaware & Raritan Canal Company stock, up to

the times of the sales thereof, paid an average semi-annual dividend of 5 per cent., with occasional special stock dividends and the value of the stock at the time of the sales, appears from the prices paid for it, proved to be the current market rates. (Test. complainant, fol. 222; test. B. Cartright, fols. 88 to 91; test. S. Jaudon, fols. 142, 152, 153, 164, 165).

The dividends on stock of the Delaware & Raritan Canal Company since the sales of the shares of the complainant, appear by the statement of the transfer agent of the company, Francis S. Conover, made evidence in this case by stipulation of the attorneys. (Fols. 183 to 189).

The allegations in the bill as to demands of payment of the value of the stock, or a restoration of it to the trust, are admitted by the bank as to that defendant, and proved as to Duncan, Sherman & Co. by the testimony of A. F. Walker, the objection thereto being waived by stipulation. (Fol. 180).

In regard to the breach of trust alleged in the bill, in respect to the $5,600 U. S. loans, the value thereof, &c., the defendant, Samuel Jaudon, is the only person interested as defendant, and as to him the bill is admitted.

JURISDICTION.

The jurisdiction in this case has not been questioned, and is perfect.

The allegations in the bill to the residence and citizenship of the parties, not being controverted by plea, must be taken as true. A general answer does not put them in issue; it is matter of preliminary inquiry. (Conk, Tr., 355; 1 Peters 476; 21 Howard, 202; 3 Id, 424; 6 McLean 13; 4 Mason, 435; 2 Woodbury & M, 497; S. C. 10 Law Rep. 152; Jones *v.* Andrews, Dec. T, 1870, 10 Wallace, 327; 2 Abb. U. S. Prac. 68, 69; Coal Co. *v.* Blatchford, 11 Wallace, 172.

The defendant, Charles B. Jaudon, is a mere formal party. No relief is asked or given against him. He is

not connected with the other defendants in interest, and has no interest in the litigation. He appeared and answered, admitting the bill.

If the suit should be dismissed as to him, it would not affect the suit as to the other defendants.

See Brown *v.* Strode, 5 Cranch 303; McNutt *v.* Bland, 2 Howard 110; Huff *v.* Hutchinson, 14 Howard, 586; 2 Abb. U. S. Prac. 13, 14; Irvine *v.* Lowry, 14 Peters 293. See also other cases above cited.

Wormley *v.* Wormley, 8 Wheaton 421, also cited under the fourth point, is very much like this case, and identical with it in principle in respect to the present question.

Mr. Justice Story, who delivered the opinion of the court, at the close of his opinion, says: "An objection has been taken to the jurisdiction of the court, upon the ground that Wormley, the husband, is made a defendant, and so all the parties on each side of the cause are not citizens of different States, since he has the same citizenship as his wife and minor children. But Wormley is but a nominal defendant, joined for the sake of conformity in the bill, against whom no decree is sought. He voluntarily appeared, though perhaps he could not have been compelled to do so. Under these circumstances, the objection has no good foundation. This court will not suffer its jurisdiction to be ousted by the joinder or non-joinder of formal parties; but will rather proceed without them, and decide upon the merits of the case between the parties, who have the real interest before it, whenever it can be done without prejudice to the rights of others."

POINTS ON THE DEMURRERS.

I.

The bill is not multifarious for the causes stated in the demurrers, or otherwise.

It states the existence of a trust, the disposition by the trustee of a portion of the trust property in breach of the trust, and a misappropriation of the proceeds thereof to his own use.

That by the aid of the defendants demurring, the trustee pledged, or hypothecated, to three of the defendants demurring, separately, another portion of the trust property, as security for the repayment of moneys loaned or furnished to the said trustee on his individual account, those defendants knowing at the time that the trustee held the property, not in his own right, but as such trustee, and being legally chargeable with knowledge that the trustee had no right to pledge or dispose of the trust property for his private use, and that those defendants sold the property, and applied the proceeds to extinguish a private indebtedness of the trustee to them.

That the trustee also pledged to the other defendant demurring, separately, a further portion of the trust property as security for moneys loaned or furnished to the said trustee on his individual account, with like knowledge, and being chargeable with like knowledge, who in like manner sold the property and applied the proceeds to extinguish a private indebtedness of the trustee to them.

Upon which facts it is prayed that the trustee account for all property thus wrongfully disposed of and converted to his private use, and restore the same to the trust, or pay the value thereof with interest into Court, and that the defendants demurring may respectively account for the property wrongfully pledged or hypothecated to them, and disposed of by them, and restore the

same to the trust, or pay the value with interest into Court.

In short, the general object of the bill is an accounting by the trustee for trust property misappropriated and converted by him, a restoration thereof to the trust, or the payment of the value thereof into Court; and a like accounting by other persons to whom respectively portions of the trust property have been disposed of, with knowledge that the dispositions were in violation of the trust; a restoration thereof to the trust or the payment of the value into Court.

The authorities are decisive that in an action for an accounting by a trustee, with relief, as to trust property wrongfully disposed of and converted by him, all persons who have received portions of the trust property, under circumstances rendering them accountable for it, may be united as defendants with the trustee, and the claims against them be enforced in the action.

In Edwards on Parties, p. 8, it is said, "there is a class of cases where persons, who are not absolutely necessary as parties, may be made defendants at the election of the complainant. Thus, if a trustee has parted with the trust fund, the *cestui que trust* may proceed against the trustee alone to compel satisfaction, or the fraudulent assignee may be joined with the trustee at the election of the complainant. Bailey *vs.* Inglee, 2 Paige Chan. R. 278." which fully sustains the position. See Story's Eq. Pl. § 285, 285 *a*, 286, 286 *a*, and numerous cases there cited in the notes for the same principle applied to various cases; also Barbour on Parties, 356, 461, and cases there cited.

In Bank of America *vs.* Pollock, 4 Edw. V. Chan. R. 215, it is held where a clerk embezzled moneys, investing part in the name of A and part in the name of B, all were proper parties to the employers bill to reach the fund.

In Brinckerhoff *vs.* Brown, 6 Johns. Chan. R. 139,

it was held that "different judgment creditors may unite in one bill for discovery and account, the object of which is to set aside impediments to the remedies at law created by the fraud of their common debtor, and to have his estate distributed among them, &c."; also "that a bill may be filed against several persons relative to matters of the same nature, forming a connected series of acts all intended to defraud and injure the plaintiffs, and in which all the defendants were more or less concerned, though not jointly in each act." Chancellor Kent observes, in reference to the latter proposition, "The defendants performed different parts in the same drama, but it was still one piece, one entire performance, marked by different scenes." Several cases are cited which are directly in point.

In Fellows *vs.* Fellows, 4 Cow. 682, it is held that "a creditor's bill will lie against a debtor and his grantees under distinct and successive fraudulent conveyances. The matter in demand is the property of the debtor, and there is a common interest among all centering in the point of issue in the cause."

See also Boyd *vs.* Boyd, 5 Paige, 65.
Blackett *vs.* Laimbeer, 1 Sanf. Chan., 366.
Richtmyer *vs.* Richtmyer, 50 Barb., 55, 60.
Lawrence *vs.* Bank of the Republic, 35 N. Y. R., 324.

In foreclosure suits the principle is of constant application by making subsequent grantees, mortgagees, &c., of distinct parcels of the mortgaged premises, by separate deeds, at different times, parties to foreclose their rights to redeem.

The same general principle prevails in the Federal Courts. In Shields *vs.* Thomas, 18 How, 253, it was held that several claimants of portions of an estate might unite in filing a bill without making it multifarious. In Fitch *vs.* Creighton, 24 How, 159, it was held that "the bill is not multifarious because it claims to enforce the

liens for assessments upon several lots in a city benefited by the improvements on the street."

Mitford Pl. 181, " Where one general right is claimed by the bill, though the defendants have separate and distinct rights, a demurrer will not hold." See cases there cited.

See Gilchrist *vs.* Stevenson, 9 Barb., 9. Willards Eq. Jur. 471, 472.

There is no definite rule as to what constitutes multifariousness in a pleading in Chancery. Each case must depend upon its own circumstances, and much must be left to the sound discretion of the Court.

Grimes *vs.* Chew, 2 How, 619, 642.
Oliver *vs.* Piatt, 3 How. 333, 411, affirming S. C., 3 McLean, 27.
McLean *vs.* Lafayette Bank, 3 McLean, 415. 1 Mylne and Craig, 603. 3 Id., 85. Storys Eq., Pl. § 530.

II.

The second ground of demurrer by the Bank, but which the defendants, Duncan & Sherman, do not present—" that the owners of the residuary estate in the property in said bill mentioned and described are necessary parties to the said bill," &c., &c., " but that the said complainant has not made the said children or owners of the residuary estate in default of children, parties to said bill," is without merit.

1. It does not appear the complainant has had children, or if she has, that they are living. The will was made in or previous to 1833.

Nor does it appear there are owners of the residu-

ary estate in default of children—there may be an escheat.

The facts could be brought before the Court only by plea or answer.

2. The case of Dandridge *vs.* Washington's Executors, 2 Peters, 370, is quite analagous to the present as to this question.

The testatrix directed that the interest of certain funds should be applied to the proper education of certain persons, her nephews, and gave to each of them who should live to finish his education, or reach the age of 21 years, one hundred pounds. She also gave the whole of her estate to be divided among certain persons who should be living when the interest applicable to the education of the nephews should cease to be required, they being some of the persons among whom the same was to be divided, and the division was to be deferred until then.

One of the nephews filed a bill against the executors only, charging that they had not paid the moneys bequeathed to him, and praying that they might be decreed to pay the same. The defendant insisted that not only the two nephews whose education was provided for by the testatrix should have been made parties, but also all the residuary legatees.

So far as the bill sought to obtain such a portion of the fund as was applicable to the education of the nephews, the Court held that they alone were required to be made parties; but the Court did not consider it necessary to make the residuary legatees parties in a proceeding, the sole object of which was to ascertain and distribute among the nephews of the testatrix the amount to which they were entitled for the expenses of education.

The Court say: "They have undoubtedly an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing

every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees as by this. In all such cases the executors represent the residuary legatees and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors."

Mitford's Pl., 230, [173].—(It is a well settled rule that where real property in question is subject to an entail, it is generally sufficient to make the first persons in being in whom an estate of inheritance is vested, a party with those claiming prior interests, omitting those who may claim in remainder or reversion after such vested estate of inheritance; and a decree against the persons having that estate of inheritance will bind those in remainder or reversion."

See Story's Eq. Pl., § 144 and onwards, and notes; also § 198, Eagle Fire Ins. Co. *vs.* Cammet, 2 Edw. V. Chan. R., 127; Nodine *vs.* Greenfield, 7 Paige, 544.

III.

The rule that all persons materially interested in the subject of litigation should be made parties, plaintiffs or defendants, is a rule established for the convenient administration of justice, and should be restricted to parties whose interests are in issue, and are to be affected by that decree.

The relief granted will always be so modified as not to affect the interests of others.

Mechanics Bank of Alexandria *vs.* Seton, 1 Pet., 299; Elmendorf *vs.* Taylor, 10 Wheat, 152; Story *vs.* Livingstone 13 Pet. 359; Wendell *vs.* Van Rensselaer, 1 Johns. Chan., 249; Executors of Brasher *vs.* Van Cortland, 2 Johns. Chan., 247.

There is a distinction between active and passive parties; the former are such as are so involved in the subject in controversy, that no decree can be made without their being in court; the latter are such that complete relief can be given to those who seek it without affecting their interests.

Joy *vs.* Wirtz., 1 Wash. Circt., 517.

In proceeding to set aside a conveyance of real estate, it is not necessary to make a mortgagee of the estate a party, his rights under the mortgage not being brought in question.

Venable *vs.* Bank of the U. S., 2 Pet., 107.

Where one was clearly interested in the subject-matter of a suit in equity, but nothing was asked from him by the bill, and his rights were not put in issue, and nothing could be required by the decree to be done by him, held, that it was not necessary to make him a party.

Society for the Propagation of the Gospel *vs.* Town of Hartland, 2 Paine, 536.

On a bill filed by an executor against a devisee of lands charged with the payment of debts, for an amount of the trust fund, &c., the creditors are not indispensable parties to the suit. The fund may be brought into Court, and distributed under its direction, according to the rights of those who may apply for it.

Potter *vs.* Gardner, 12 Wheat, 498.

IV.

The substantial relief sought by the bill is the restoration to the trust of that portion of the trust property which has been improperly diverted from it, or the payment into Court of the value of that part of the trust property. This relief can only benefit the residuary owners, it cannot harm them; hence their interests do not require that they be made parties, and they may properly be omitted.

The Court can, by its decree, determine the entire litigation in the absence of the residuary owners, and at the same time preserve and protect their rights.

V.

The third ground of demurrer of the Bank, viz.: that the complainant has not legal capacity to sue, and that the right of action is in the trustee, &c., is frivolous. The cause of action which exists is against the trustee for a breach of trust, and unless the *cestui que trust* might sue, there is no remedy.

POINTS ON THE MERITS ON THE PLEADINGS AND PROOFS.

I.

The pledge or hypothecation of the stock to the defendants, Duncan, Sherman & Co., and The National City Bank, respectively, was a breach of trust, and a misappropriation and conversion of the stock, and its proceeds, by the defendant, Samuel Jaudon, the trustee.

The transaction between that firm and the Bank, severally, and the defendant, Samuel Jaudon, was strictly a loan by the former to the latter, creating the relation of debtor and creditor, with a pledge or hypothecation, by him to the former, of the stock as a collateral security for the loan. It was so both in form and in substance, or legal effect.

It was an unlawful, wrongful dealing by the trustee with the trust fund, subjecting him to liability to the *cestui que trusts*, as for a conversion of the stock to his private use.

The loan was to the defendant, Samuel Jaudon, in his individual, personal character, aside from the trust; the pledge or hypothecation was of trust property, to secure a loan to him individually, personally, irrespective of the trust, which was unauthorized and illegal.

He had not authority, or any right, to make the loan as trustee, and if he had assumed to do so, it would have been, in legal effect, a loan to him in his individual, unofficial character, imposing upon him a liability therefor, only in the like character, and a pledge or hypothecation of the stock, as security, in such a case would have been equally a breach of trust and a conversion of the stock.

There was no occasion for a loan to the trust, no authority by the trustee to obtain a loan, if there had been occasion for funds in the business of the trust.

The purpose of the loan, in each case, was to discharge liabilities contracted in the purchase, or "carrying" of "Broad Top Coal Stock," purchased and held by defendant, Samuel Jaudon, in his individual, personal, unofficial name and character, having no relation to the trust, beyond the exceedingly remote one of an intention by the said Jaudon, if the stock should prove to be "highly remunerative," to offer it to the complainant as an investment in the place of The Delaware & Raritan Canal Company stock, thus unlawfully and wrongfully used by him,

giving her, to her great surprise, the privilege of taking it as such investment, if she should desire to do so. The loans were used for the purpose stated.

II.

There is no, even plausible, ground for treating the transaction of the defendant, Samuel Jaudon, with the firm of Duncan, Sherman & Co, and the Bank, as, on his part, reinvestments of the trust funds.

There was nothing to reinvest beyond the stocks. The stocks were not sold, and there was not, in the mind of Samuel Jaudon, a thought of the possibility that they might be; on the contrary, in his glowing fancy, it was a certainty that the "Broad Top Coal Stock," in the immediate future, would rise to such a height in value that the loans would easily be repaid.

Were the nine successive loans by the bank within the period of one year, each, in Wall Street Bank understanding, and law, an independent transaction, and not a single loan with subsequent renewals, nine different reinvestments of the trust funds?

But the trustee had not, in law or morals, any right to make re-investments of the investments in the Delaware & Raritan Canal Company stock. That stock was paying average semi-annual dividends of five per cent.; there was no occasion for changing the investment in it, and it was not the part of wisdom or prudence to do so, if the trustee had authority; but he had not such authority without the consent of the beneficiaries.

He had not the consent of the complainant, one of the beneficiaries, nor so far as appears of the others, nor the executors, to any pledge or hypothecation or reinvestment in respect to that stock, his transactions with the

firm and the bank in the matter were kept profoundly secret, until long after the stock had "vanished," in the language of the complainant, he in the meantime continuing to make payments to the complainant, as of dividends on the stock.

Independent, however, of these views, it is a fatal objection to treating the transactions as reinvestments by the trustee of trust funds, that neither under the provisions of the will, nor the general rules of law had the trustee authority to invest in such securities; and he could not do so without a breach of trust, and a conversion of the funds.

The clause of the will numbered "Fifteenthly," limits the investments by the trustees "to the stock of the United States, or the stocks or funds of any individual State." This limitation is qualified by the first codicil to the will in regard to "the loan which I may hold of the City of Philadelphia, and of the Southwark loan, and the ground rents, which I may die possessed of," and it is directed "that my trustees will consider such property as above named as equal to United States or State loans or stocks, as above specified." Beyond this qualification the limitation remains in full force.

That an investment in the "Broad Top Coal Stocks" would have been a breach of trust, because unauthorized by law, is settled by the case of King *v.* Talbot, 40 N. Y. R., 76, and see the cases there cited.

III.

It cannot be claimed under the evidence, that the transactions between the defendant, Samuel Jaudon, and Duncan, Sherman & Co., and the National City Bank, so far as the use of the Delaware & Raritan Canal Company

stocks is concerned, were justified, as to the complainant, by any authority or consent given by her to Samuel Jaudon, to such a use of the stocks.

In regard to that particular use she was not consulted, and had no knowledge or information; she was not consulted, and had no knowledge or information that anything of the kind was contemplated, at any time, as to any change of the investment in The Delaware & Raritan Canal Company stocks; and she never gave any general authority or consent to a dealing by the trustee with the trust funds, further than may be inferred from her testimony that the investment of the trust funds was left with the executors, by which, as she subsequently explained, she meant that she presumed they had the settlement of the estate, and that they would do it legally and properly; that she was not consulted about it, and that was all she meant.

She did not, at any time, say or do anything to relieve the trustee from any legal responsibility in regard to the use or investment of the trust funds in any just or fair interpretation of her language or conduct.

In King *v.* Talbot, above cited, it was held that a clause in the will, in regard to the executors "entrusting to their discretion the settlement of my affairs and the investment of my estate for the benefit of my heirs," "neither added to, nor in any wise affected the duty or responsibility of these executors; without it they were clothed with discretion; with it their discretion was to be exercised with all the care and prudence belonging to their trust relative to the beneficiaries."

That doctrine is decisive as to this point.

IV.

The defendants, Duncan, Sherman & Co. and the National City Bank, respectively, were legally chargeable with notice and knowledge, that the defendant, Samuel Jaudon, held the Delaware & Raritan Canal Company stocks, as trustee for the complainant, and that the pledge or hypothecation thereof by him to them, respectively, as collateral security for the payment of the loans by them to him, was a breach of his trust; hence they became accountable severally for the stock they severally received, to the complainant, and the sale of the stock by them respectively, was a wrongful conversion of the same to their own use.

The certificates showed upon their face, that the defendant, Samuel Jaudon, held the stock as trustee for the complainant; which was notice to them of the ownership of the stock by her; and that pledging it as collateral security for the loans, was a violation by the trustee of his trust.

It was at least notice to them of the complainants rights sufficient to put them upon inquiry, and to charge them with knowledge of what they would readily have learned upon fair inquiry.

Upon such inquiry they would have learned from the will the nature of the trust; from the complainant that the stock belonged to the trust; that no loans were wanted for the trust; that the loans applied for were desired for personal unofficial purposes of Samuel Jaudon; and the same facts would have been learned on inquiring of Samuel Jaudon; from which the conclusion would be inevitable and apparent, that such use of the stock would be in violation of the trust.

In support of these propositions, see Lowery *v.* Commercial & Farmers' Bank, 4 Circuit, Md., 6 West. Law J. 121. The Ploughboy, 1 Circuit, Mass. 1 Gall 41. Carr *v.* Hilton 1 Circuit, Me. 1 Curt. C.C. 390. Hinde *v.* Vat-

tier, 1 M'Lean 110. Dexter *v.* Harris, 1 Circuit, R. I., 2 Mass., 531. Oliver *v.* Piatt 3 How. U. S. 333. Mech. Bank of Alexandria, *v.* Seton 1 Pet. 299. Wormly *v.* Wormly, 8 Wheat. 421. Ganard *v.* Pittsburg & Connellsville R. R. Co. 29 Penn. St. R. 158, 159. Jaques *v.* Weeks, 7 Watts 266. Epley *v.* Witherow, Id. 163. Hill *v.* Epley, 31 Penn. St. R. 331. Field *v.* Schieffelin 7 Johns Chan. 150. Swarthout *v.* Curtis, 5 N. Y. R. (1 Selden 301. Anderson *v.* Van Alen, 12 Johns. R. 343. Pendleton *v.* Fay, 2 Paige 202. Baker *v.* Bliss 39 N. Y. R. 70. McLeod *v.* Drummond, 17 Vesey Jr. 152, and particularly the observations of the Lord Chancellor Eldon p. 170. Bayard *v.* The Farmers' & Mechanics' Bank of Philadelphia, 52 Penn. St. R. 232. Peirie *v.* Clark, 11 Serg. & Rawle 377. Shaw *v.* Spencer, 100 Mass. R. 382.

In Lowery *v.* Commercial & Farmers' Bank, 6 West. L. J. 121 (4Cir. Mar.) it was held that "a bank which permits a transfer of its own stock by an executor, as such, on its books, is chargeable with notice of the will under which he acts, and the contents thereof; and an omission to examine such will and the specific bequests of the stock, standing on its books in the name of the testator, amounts to negligence, for which it will be held liable, on a conversion by the executors to his own use of the stock of the *Cestui que trust.*"

In 1 Gall 41, 1 Cir. Mass, The Ploughboy, it was held to be "a general rule that whatever is sufficient to put the party upon inquiry is good notice; where a party has knowledge of the facts he has notice of the legal consequences resulting from those facts."

Livingston *v.* Maryland Ins. Co., 7 Cranch 506. "It is a general rule, that a paper which expressly refers to another paper within the power of the party, gives notice of the contents of that other paper."

Carr *v.* Hilton, 1 Curt. Cir. Ct. 390, 1st Cir. Me.

"Information which makes it the duty of a party to make inquiry, and shows where it may effectually be made is notice of all facts to which such inquiry might have led."

Dexter *v.* Harris 1st Cir. R. I. 2 Masson. 531.

"Purchasers are affected with constructive notice of all that is apparent upon the face of the Title Deeds under which they claim, and of such other facts as those already known, necessarily put them upon inquiry for and as such inquiry pursued with ordinary diligence and prudence would bring to their knowledge."

Bayard *v.* The Farmers' & Mechanics' Bank of Phila. 52 Penn. St. R. 232. "In equity, whatever puts a party upon inquiry is notice of what inquiry must reveal."

1 Pet. 299. Mechanics' Bank *v.* Seton. "Full notice of a trust draws after it all the consequences of an express declaration of trust."

It it an important circumstance in the case, in respect to the question of notice by Duncan, Sherman & Co., and the National City Bank, of the breach of trust by the trustee, that the trust by the will is restricted to simply an investment of the trust funds, not requiring to its due execution the making of loans, and pledging of trust securities for their payment. It would be difficult to conceive of a case arising in the business of trust, where such a loan and pledge would be necessary or proper. And certainly, in the absence of an express authority to make such loans and pledges, none can be implied, unless if at all, in cases of emergency demanding it—exceptional cases without the general rule. As the trustee is not clothed with a general authority of that kind, and possesses it, if at all, only in special cases, parties making loans to the trustee and receiving trust property as collateral security, do so at their peril of being held accountable to the trust for the property, if in fact authority to the trustee was wanting in that particular case, or the

loans were for his private purposes. *Priam facie*, the pledge of the property would be a breach of the trust, and the onus would be on the lender to disprove it.

Such a case is very different from that of an executor, administrator, or guardian, having general authority to sell the property, borrow money on a pledge of it for the purposes of his trust, &c.; or the case of any trustee having extended general authority by the terms of the trust. Dealings by trustees of the latter character, having *prima facie* authority for their acts, would not in many cases be notice to the other parties of a breach of trust, where in the case of trustees with more limited and restricted authority it would be otherwise.

The distinction is recognized and applied in many cases.

The case of Bayard *v.* The Farmers' & Mechanics' Bank of Philadelphia, 52 Penn. St. R. 232, presents this distinction forcibly, and besides is in point in support of the present case generally. The note is as follows:

1. "A purchaser of stock upon its transfer to him is protected in his purchase, although there was no right to make the transfer.

2. Banks and other corporations are trustees for the property and title of each owner of the stock. Having in their keeping the primary evidence of title, they are held to proper care and diligence in its preservation; and may demand evidence of authority to transfer.

3. Although generally the legal title is sufficient evidence of a right to transfer, yet if a transfer would be a wrong to an equitable owner, the corporation make themselves parties to the wrong if they permit it to be done, knowing such equitable right.

4. Letters of Administration are always sufficient evidence of authority to transfer, because a sale and

transfer of the stock is in the line of the duty of the administrator, whose primary duty is to dispose of the property, to pay the debts of the intestate, and distribute the residue.

5. A trustee of an insolvent debtor stands on the same footing, and generally an executor, even if the stock may have been bequeathed specifically, the transfer agent having no means of knowing whether it will be necessary to pay debts.

6. The powers of an executor or administrator differ from those of an ordinary trustee, the duty of the latter being not administration, but custody and management.

7. A transfer agent before permitting the transfer of stock, appearing on the face of the certificate to be held in trust, has a right especially if the *cestui que trust* is named, to require the exhibition of the authority to transfer beyond the certificates."

Judge Strong, in giving the opinion of the Court, says: That corporations are alike trustees of the property and of the title of each owner of the stock. Generally sufficient evidence of a right to transfer, is found in the possession of legal title to the stock.

Yet the true equitable ownership may be in another, to whom the transfer may be a gross wrong.

The corporation make themselves parties to the wrong, if, with knowledge there is no equitable right to transfer, they permit it to be done; and in equity whatever puts a party upon inquiry is notice of what inquiry may reveal.

A distinction is taken between a sale by administrators' trustees of insolvent debtors, executors and trustees for mere custody and management.

Yet transfer agents have been, in some cases, required to make inquiry into the right of the executor, beyond

the letters testamentary, and even beyond the will itself. Lowry *vs.* The Commercial & Farmer's Bank, of Baltimore, decided by Chief Justice Taney, American Law, J. N. S. vol. 3, p. 111.

"No purchaser either of land or personalty would be safe in buying from a known trustee, without looking at the nature and extent of his trust. It is true a trustee may have power to sell, but the power is not a necessary incident to his trust, as it is to an office of an executor."

"Such knowledge" of the trust, "was given in this case by the form of the certificates."

"There is no case in which it has been held that a trustee of stock, whose certificate shows a declared trust for another named, has a right to transfer it, without showing a power beyond his certificate."

Ashton *vs.* Atlantic Bank, 3 Allen, (Mass.) is a case on the other side of the line of distinction suggested, and decides that "if a trustee appointed under a will, with power to sell real estate, and invest the proceeds according to his discretion, and to use such portion of the trust property as might be needful for the purpose of finishing a dwelling house which was in process of construction when the will was made, has sold a portion of the real estate, and taken a note therefor payable to himself as trustee under the will, and afterwards has borrowed money for his own use, and pledged the note as security therefor, to one who had no knowledge of any facts relating to the trust except what appeared upon the face of the note, the form of the note alone, under the circumstances, does not afford a sufficient presumption of knowledge that the pledge was made in violation of the duty of the trustee to authorize his successor to maintain a bill in equity to compel its delivery to him."

This decision turned upon the "very broad and general power," vested by the will in the trustee.

In Petrie *vs.* Clark, 11 Serg, and Rawle, 377, which is

cited in support of the general doctrine claimed by the complainant, as to a breach of trust and notice thereof, Gibson, J., says: The later cases have gone much further in circumscribing the executors authority over the assets, and with great propriety, very far to overrule Lord Hardwicke's decisions, that an assignee of the assets for his own debt cannot be disturbed, except on specific evidence of actual and positive collusion."

Those decisions of Lord Hardwicke have been questioned in other cases, and are manifestly not law. See the cases cited in Field *vs.* Schieffelin, 7 Johns, Chan. 150, 156. McLeod *vs.* Drummond, 17 Vesey Jr. 152, 165.

In the case last above cited, Lord Chancellor Eldon, after reviewing the cases, says in reference to the question of the validity of a transfer by an executor.

"It seems to have been considered sufficient to establish, that the transfer was not a pledge for an antecedent debt; I cannot hold that it is competent to an executor even against a pecuniary or residuary legatee, to go to a banker immediately after the testator's death, and to pledge the property of the testator in consideration of a loan to be then made, if the circumstances show that the banker knew he was lending the money to that person in such a manner, not to be applied conformably to the duty of the executor, or, as in the instance of the future advances to Mrs. Tyler, though *bona fide*, not in the character of executor, but as a trader without any connection with that character. If there was nothing more in the case, it is very difficult to admit the proposition, that the banker could have received a deposit of these bonds, knowing them to be such, from these persons, as security for a debt then to be contracted; but the nature of the contract itself, the circumstance that their own property was also delivered over, and other circumstances, showing that the loan was made to them not as executors, but as army agents. The Master of the Rolls truly observes, that there is a great difference between advancing money at the time upon securities, and taking a security in dis-

charge of an antecedent debt, but that is by no means conclusive. The argument is carried nearly to this extent, that a person lending money at the time upon the deposit of the securities can hardly be supposed to mean fraud, as there is no temptation to fraud. Admitting, however, that the bankers had no other motive for the advance upon such a deposit, than they generally have if *it appears in the transaction itself*, that the borrower is about to apply the money so raised on the testator's property, to objects with which his affairs have no connection, I should hesitate to say, that as the temptation was so slight, that this Court would not examine, whether that was not a most inequitable transaction, with reference to the persons entitled to that property."

In the present case the breach of the trust by the trustee "appeared in the transaction itself."

In Pendleton *vs.* Fay. 2 Paige, 202, it was decided that "where an insolvent trustee assigned a mortgage purporting on its face to be given to him as trustee, partly in payment of his own debt to the assignee and partly for cash which he applied to his own private use, the assignee was held to be chargeable with notice of the misapplication of the trust fund." The Chancellor says: "The assignment on its face showed that he was acting as executor. This was sufficient to put them on inquiry, and they ought not to have taken the assignment and paid the money, until they had ascertained that he was not committing a fraud upon the estate." The principal part of the purchase money was paid in cash.

See Hill *vs.* Simpson. 7 Vesey, Jr., 152.

A very recent case which received elaborate examination by counsel and the Court, and which strongly supports the positions on the part of the complainant in this case, is Shaw *vs.* Spencer, 100 Mass., R. 382. The reporters' note shows that these points were decided.

"A certificate of stock expressed on its face to be

transferable only on the books of the Company by the holder thereof in person, or by a conveyance in writing recorded on said books and surrender of this certificate; and transferred in blank on its back, is not a negotiable certificate." See the certificates in the present case. (Fols. 107 to 113.)

"One holding stock as trustee has, *prima facie*, no right to pledge it to secure his own debt growing out of a transaction independent of the trust."

"If a certificate of stock expressed in the name of "A. B. Trustee,' is by him pledged to secure his own debt, the pledgee is by the terms of the certificate put on inquiry as to the character and limitations of the trust; and if he accepts the pledge without inquiry, does so at his peril."

The cases in the law of partnership as to attempts by one partner to pledge the responsibility of the firm for his own individual debt, and as to what is notice to the party dealing with him of the wrongful act are in point in this case. Wilson *vs.* Williams, 14 Wend. 146. Joyce *vs.* Williams, Id. 141; Bank of Vergennes *vs.* Cameron, 7 Barb, 153; Elliott *vs.* Dudley, 19 Id. 326; Austin *vs*, Vandemark, 4 Hill, 259; Fielding *vs.* Lakins 6 Abb., prac, N. S., 341; Traders' Bank of Rochester *vs.* Bradner, 33 Barb, 379.

V.

The evidence establishes actual notice to Duncan, Sherman & Co., and to the National City Bank, that the loans by them to Samuel Jaudon were obtained for purposes in violation of his trust.

The testimony of William B. Duncan shows he was informed, on the original application for the loan made by his firm, that it was wanted in reference to his having purchased some coal bonds, which he thought would be a desirable change of investment. An investment of the trust funds in those bonds would have been a breach of trust. (Fols. 115, 127, 128; King *v.* Talbot, 40 N. Y. R. 76).

The evidence of the nine loans, within the period of a year, upon the pledge of the stocks, by the bank to Samuel Jaudon, proves and was notice to the bank, that the loans were on his personal, unofficial, account. It was gross negligence and wrong to the *cestui que* trust, to permit such a series of loans, without inquiry on the subject. (Fols. 91 to 106).

VI.

The defendants are not entitled to protection, on account of their alleged ignorance of the facts. It was their duty to inquire—to examine the certificates; and on learning Samuel Jaudon held the stocks as trustee, to inquire further as to his authority to pledge the stock, which inquiry would have revealed the proposed breach of *trust.* If they omitted their plain duty, it was gross negligence, and they must abide the consequences.

VII.

The right of the complainant to enforce a restoration to the trust of the stock converted, or its value, with the dividends received or which might have been received, is clear.

A trustee who has committed a breach of trust, by loaning money, may compel a restoration to the trust of the money or indemnity. (Abbott's Executors *v.* Reeves, 49 Penn. St. R. 494).

The like remedy may be pursued by a *cestui que trust*, especially where the trustee is involved in the breach of trust.

In the case of a corporation violating its trust, when the directors or managers are participants in the wrong, any stockholder may maintain an action for redress, although ordinarily such bodies must assert their rights and pursue their remedies in the corporate name.

The right of a *cestui que trust* to sue for the protection of the trust fund rests on a clearer and firmer basis.

Since the foregoing was put in type, a printed copy of the brief filed by the solicitor for the appellants, Duncans and Sherman, has been obtained, a short direct answer to which, in addition to the more general answer herein contained, may be of service. And it will be equally applicable as an answer to similar views which may be presented by the appellant, The National City Bank.

In regard to the statement of facts, reference is here made to the full and particular statement of facts herein, for the correction of deficiencies, and also of errors inseparable from so great brevity.

And in respect to what is said as to the bill containing several distinct, unconnected, causes of action and multifariousness, reference is made to the argument herein on the demurrers, which is included in this brief for use in case the Court should hold the decision on the demurrers to be reviewable, after the answers filed.

The proposition of the second point, in substance, that by the omission of those defendants, on the application by the trustee for the loan, to personally inspect the certificates, or make inquiries as to their contents, turning

the applicant over to a clerk instructed by them to make the loan, and receive the certificates as collateral security, they are not chargeable with notice of the trust which the certificates disclosed, is opposed to the principle of numerous cases cited herein, and to good sense. Purchasers of such certificates, expressing that the seller holds the stock as trustee of a person named, cannot claim to be *bona fide* purchasers without notice, by shutting their eyes to what appears on the face of the certificates. It was their duty to look at the certificates, which they owed to the *cestui que trust*, for the protection of the rights of the latter; their neglect to do so was gross carelessness, subjecting them to liability to the trust for the value of the certificates. Again, notice to the Clerk was notice to his principal, producing the like result.

The third and fourth points assume that a sale of the stock represented by the certificates was made by the trustee; that he had power to sell for the purposes of the trust, and claim that the purchasers might properly presume that the sales made were honest and legal, and hence that they obtained a good title.

One decisive answer is, that no absolute sale by the trustee was made or contemplated; he did not propose or desire to sell, but only to obtain loans upon a pledge or hypothecation of the stock as collateral security; such were the transactions between the parties. He desired to retain the title to the stock, and confidently expected to be able to redeem it; he had no thought of selling the stock, (fols. 143, 167).

The loans were, in fact, obtained and made to him, not as trustee, but in his individual character and capacity, and for his private use. Such is his testimony; and there is no evidence to the contrary, (fols. 137 to 140, 141, 147). All the appellants knew that fact at the time. As to Duncans and Sherman, he did not apply for the loans as trustee, (see their answer, fol. 45). Indeed, those appellants claim not to have known the stock was held by him as trustee, (see their answer, fol. 46). The testimony of

William B. Duncan does not controvert that of the trustee on this subject, or show the loans were made to him other than in his individual private capacity, (fols. 115, 124).

As to the appellant, The National City Bank, besides the testimony of the trustee to that effect, (fols. 142, 143), its books show the loans were to him in his private capacity and not as trustee, (fol. 103). The testimony of its cashier is of the like character, (fols 76, 77, 79, 83, 92, 103, 114). Its answer states the loan was to "Samuel Jaudon," without more, (fols. 56, 57, 58).

Pledging or hypothecating the stocks as collateral security for the loans obtained by the trustee in his private character and for his private use, with knowledge by the lenders, with which they are chargable from its appearing on the face of the certificates, that he held the stock as trustee for Mrs. Jaudon, was a clear breach of the trust, and conversion of the stock by all concerned, making all liable to the trust for its value.

Again, from the nature of the trust, being for ~~administration~~ only, with no authority in terms to borrow money, and nothing appearing in the circumstances of the case to call for it—with the knowledge of which the lenders were chargeable—the trustee did not possess such authority. See authorities in this brief before cited.

The fact in this brief before adverted to of the communication by the trustee, on applying to W. B. Duncan for the loans made by his firm, that they were wanted in reference to the purchasing or carrying of coal stocks—in which investments could not legally be made under the terms of the will, or the general rules of law; and thereby that the firm had notice of the breach of trust; and the fact, also in this brief before commented upon, that the bank made numerous successive loans to a large amount on pledges of the stocks, in the period of some two years, thereby showing that he was appropriating the stocks to his private purposes—are quite significant in this connection. Those facts, respectively, should have aroused inquiry and prevented the loans.

The consent of the trustee to the sale of the stocks by the appellants, the pledgees, at a subsequent period, when he could not prevent or avoid it, charged with the heavy burden of the indebtedness, could not relieve the appellants from liability to the trust for the breaches of trust and conversion in the previous dealings—or preclude that sale being a breach of trust. The sale was under the power given at the making of the loans, and not under a new authority (fols. 100, 102, 116, 119, 137, 141, 143.) But if a new authority had been given, the appellants would still be liable.

In answer to the 5th point, the fact that the stock did not belong to the class of securities for investments specified in the will cannot benefit the appellants. These loans were more than thirty years after the death of the testator, and it was rather late to arrange for a reinvestment of trust funds in the former class of securities, and rather singular in order to a reinvestment to borrow moneys, particularly so frequently. Inquiry would have revealed that the stocks had been purchased by consent of all interested, and were first class securities. But the fact that there was no sale made or thought of on either side, only a loan, pledging the stocks as collateral security, is a sufficient answer,

The sixth point needs no other answer than preferring request to the Court, to examine the cases cited by the respondent, so far as it may be deemed necessary.

STRONG & SHEPARD,
Solicitors for Complainant, Appellee.

THERON R. STRONG.
Of Counsel.

U. S. Circuit Court.

MARY T. B. JAUDON,

vs.

THE NATIONAL CITY BANK, WILLIAM B. DUNCAN and others.

Decision.

BLATCHFORD, J., The plaintiff, is the wife of the defendant, Charles B. Jaudon. She is a daughter of the late Commodore William Bainbridge, who died in 1833, leaving a will, under the provisions of which she has a separate estate of her own, placed by the will in trust for administration. By the will the testator, after making certain legacies, directed that all his real estate should be sold, and appointed William Lynch and Hugh Calhoun to be trustees, to receive all the residue of his estate, (and to invest the same in the stocks of the United States or the stocks or funds of any individual State, and, to hold the same in trust for the following purposes": (1). $28,000 to be invested, and the interest of it to be paid to his wife for her life, and at her death such stocks or funds to be equally divided among his four daughters the plaintiff being one), "the trust to remain the same for their sole use and benefit." (2). Enough to be invested to create an annual interest of $150, to be paid to his sister Mary during her life, and at her death the invested amount "to be in trust equally divided" between his said four daughters. (3). In respect to each one of said four daughters, an equal one-fourth part of his remaining estate to be invested in the funds or stocks be-

fore mentioned, in trust, the interest whereof to be paid to the daughter, for her sole use and benefit during her life, and at her death the amount so invested to be equally divided among her children. By a codicil he directed that the loan which he held of the City of Philadelphia and the Southwark loan and the ground rents be not sold, but be considered by the trustees as equal to the stocks or funds before mentioned. The trustees named in the will were in May, 1835, on their own petition, discharged from their trust by the Court of Common Pleas for the City and County of Philadelphia, and the defendant, Samuel Jaudon, was at the same time appointed by that Court trustee under said will for the widow, the sister and the four daughters, and in June, 1835, he received from the outgoing trustees all the trust estate held by them. At the death of the testator a considerable portion of his estate consisted of stock of the State of Pennsylvania, paying an interest of five per cent. per annum. The trustees named in the will made no change, while they continued to be trustees, in any of the investments, but left them as they were at the death of the testator. Soon after Samuel Jaudon was appointed trustee he sold the Pennsylvania stock and invested its proceeds in stock of the Delaware and Raritan Canal Company. This stock he apportioned among the trusts created by the will, allotting to the trusts for the plaintiff 93 shares. Although this was an investment not authorized by the will, the plaintiff approved of it, and from time to time received from the trustee the dividends made on the 93 shares. In 1857 the widow died, and the Delaware and Raritan stock which belonged to the trust for her was divided by the trustee among the trust for the four daughters, 28 shares of it going to the trust for the plaintiff. Thus the trust for the plaintiff embraced 121 shares of Delaware and Raritan Canal stock, and the plaintiff thereafter received from time to time from the trustee the dividends made on the 121 shares, knowing of the investment. Afterwards some property which had belonged to the testator was sold, and from that source

and other sources the trustee came to hold under the trust for the plaintiff, in addition to the 121 shares of canal stock, $5,600 in United States stock known as Five-Twenty Bonds.

The bill seeks to make the trustee, Samuel Jaudon, responsible for the value of $5,600 of United States stock and of 117 shares of the Canal stock, as having been disposed of by him in breach of his trust, and to have him removed from his trust and another trustee appointed in his place. It also seeks to make the defendants, the National City Bank, responsible for the 47 shares of Canal stock, and to make the defendants, Duncan and others who compose the firm of Duncan, Sherman & Co., responsible for the value of 70 shares of the Canal stock, as having been received by them, respectively from the trustee and sold, and appropriated to their use respectively, under circumstances which make them liable equally with the trustee to the plaintiff for the breach of trust committed by such trustee.

On the 16th of October, 1865, Samuel Jaudon applied to the National City Bank for a loan of $6,000 on a pledge or hypothecation of 47 shares of the stock of the Delaware and Raritan Canal Company, evidenced by two certificates of stock, one for 19 shares and one for 28 shares. The $6,000 was loaned to him by the Bank, October 16th, 1865, on that security, he giving to the Bank no obligation note or due bill for the loan, but merely depositing with it the two certificates, the loan being regarded as a loan strictly on demand, but practically as one for three months. The certificate for the 19 shares being dated January 27, 1852, and certified "S. Jaudon, trustee for Mrs. Mary T. B. Jaudon," was entitled to that number of shares in the capital stock of the company, transferable on the books of the company and on surrender of such certificate, only by him or his legal representative. The certificate for the 28 shares was dated April 14th, 1864, and certified that "S. Jaudon, trustee of Mrs. Mary T. B. Jaudon," was entitled

to that number of shares in the capital stock of the company, transferable on the books of the company only by him or his legal representative. Accompanying the two certificates when they were so deposited with the bank, but on a separate piece of paper, was an instrument dated April 18, 1864, signed "S. Jaudon, Tr. of M. T. B. Jaudon," and stating that "Saml. Jaudon, trustee of M. T. B. Jaudon," thereby sold unto
47 shares "of the joint stock of the Delaware and Raritan Canal Company and Camden and Amboy Railroad and Transport Company," standing in his name on the books of said company, and appointed
his attorney, to transfer such stock.

On the 27th of November, 1865, the bank loaned to Samuel Jaudon the further sum of $3,500 on a pledge of the same 47 shares of stock, with other securities. He repaid the loan of $9,500, with interest, on the 17th of January, 1866. He borrowed from the bank the like sum of $9,500 on a pledge of the same securities on the 19th of January, 1866. This transaction of the borrowing by him from the bank the like sum of $9,500, on a pledge of the same securities, was repeated seven times more, namely, on the 18th of April, 1866; the 19th of July, 1866; the 13th of October, 1866; the 19th of January, 1867; the 13th of April, 1867; the 6th of July, 1867, and the 12th of October, 1867. Such loan of the 19th of January, 1866, was repaid, with interest, on the 11th of April, 1866. The first six of the remaining seven loans were repaid, with interest, severally, on the 16th of July, 1866; the 10th of October, 1866; the 14th of January, 1867; the 10th of April, 1867; the 29th of June, 1867; and the 10th of October, 1867. The loan of the 12th of October, 1867, not being paid on demand, the bank, on the 10th of December, 1867, sold the 47 shares of stock, at the request of Mr. Jaudon, for the nett sum of $5,897.90, which was applied on account of the loan on the 11th of December, 1867. The securities were returned to Mr. Jaudon every time he paid up the amount of a loan, and re-delivered to the bank by him every time a new loan was made to him.

On the 18th of July, 1867, Samuel Jaudon applied to the defendants, Duncan, Sherman & Co., for a loan of $7,000, which was made to him by them on that day, on the pledge or hypothecation of 70 shares of the stock of the Delaware and Raritan Canal Company, evidenced by one certificate of stock for 70 shares. The amount was loaned on that security alone. It was a loan at 90 days. Whether a note was given for it or not is not certain. The certificate was deposited with Duncan, Sherman & Co., at the time the loan was made. The certificate was dated December 13th, 1851, and certified that "S. Jaudon, Trustee for Mrs. Mary T. B. Jaudon," was entitled to 70 shares in the capital stock of the company, transferable on the books of the company, and on surrender of such certificate, only by him or his legal representative; accompanying the certificate when it was so deposited with Duncan, Sherman & Co., but on a separate piece of paper, was an instrument signed, "S. Jaudon, Trustee of M. T. B. Jaudon," and stating that "S. Jaudon, Trustee of M. T. B. Jaudon," thereby sold unto 70 shares "of the joint stock of the Delaware and Raritan Canal and Camden and Amboy Railroad and Transportation Comps., standing in his name on the books of the said companies," and appointed his attorney to transfer the stock. On the 16th of October, 1867, when the 90 days expired, Mr. Jaudon obtained from Duncan, Sherman & Co., on the same stock, a further loan of $600, and at the same time gave directions to them to sell the stock. Between the 16th of October, 1867, and the 21st of October, 1867, the 70 shares were sold by Duncan, Sherman & Co., for the nett sum of $8,699.12. On the last-named day the loan, with interest, amounted to $7,729.88, and on that day Duncan, Sherman & Co., applied that amount from the proceeds of the sale to payment of the loans and interest, and paid over to Mr. Jaudon the remainder of the proceeds, amounting to $969.24. The power of attorney accompanying the certificate for the 70 shares is dated October 16, 1807, (a mistake for 1867), and that date was probably filled in October 16th,

1867, and it bears the signature, as witness to its execution, of Mr. J. C. Hull, the cashier of Duncan, Sherman & Co., who, at the direction of Mr. William B. Duncan, of that firm, transacted the business of receiving the certificates, and transfer, and power of attorney, from Mr. Jaudon, and furnishing him with the money loaned.

The sales of the 117 shares were made under the powers of attorney, before named, the blanks therein having been filled up at the office of the company, when under the powers, the shares were transferred on its books, and the certificates were surrendered. Notwithstanding the sales of the shares, Mr. Jaudon, in February, 1868, paid to the plaintiff an amount of money equal to the amount of dividend then paid on the 117 shares, and in August, 1868, he paid to her the sum of $205 as on account of the dividend then paid on such shares. Since that time she has not received anything on account of the income of the shares, nor have they been restored to the trust. The plaintiff did not know of any of the loans, or of any of the pledges of the shares, or of the sales of any of the shares, until December, 1868. She never authorized or ratified any of the transactions. Mr. Jaudon used the moneys obtained by him from the bank and from Duncan, Sherman & Co., on the loans, to pay which the stocks were sold to discharge indebtedness incurred by him individually, in making investments in stock of the Broad Top Coal and Iron Company, which he anticipated would be remunerative, and, if they were, he had the intention of offering the plaintiff shares in such company to replace the 117 shares. Such investments were made by him in his individual name. The plaintiff had no knowledge of such use of the moneys, or of such investments, or of such intention. The investments turned out to be worthless, and the stock was never offered to her. Mr. Jaudon is insolvent, and the trust has never received any of the proceeds of the stock, or any moneys in place thereof. The evidence shows that when Mr. Jaudon applied to Duncan, Sherman & Co., for the original loan he informed Mr. Duncan about

his having made investments in the Broad Top Company, and made known to him his expectation of being able to repay the loan from the profits of such investments.

There is no foundation for the proposition that Mr. Jaudon had any authority from the plaintiff, either specific or general to sell or dispose of the 117 shares or to pledge the same or to borrow money on them. The stock was a valuable stock; the 47 shares sold for 25 per cent. nett above par, and the 70 shares for over 24 per cent. nett above par; the semi-annual dividends upon it had averaged five per cent. in money, and it had occasionally made dividends in stock besides.

On these facts, there can be but one conclusion, and that is not only Mr. Jaudon, the trustee, but the bank and Duncan, Sherman & Co., must respond to the trust for these shares of stock; the bank for the 47 shares and Duncan, Sherman & Co. for the 70 shares. The certificates, on their face, not only stated that Mr. Jaudon held the shares in trust, but gave the name of the plaintiff as the *cestui qui trust*. The powers of attorney indicated not that he was transfering the shares in the ordinary course of his business as trustee, but that he was borrowing money for his private use on a pledge of what was in his hands as trust property. The sales of the stock when they were made by the pledgees were made by them with knowledge that the proceeds were to be applied to pay the private debts of the trustee to the pledgees, and the pledgees applied the proceeds to pay such private debts. In regard to Mr. Duncan, he was informed that the loan was to be repaid by Mr. Jaudon only out of the fruits of investments which he had made out of the stock of a company which was named. That stock was a stock which Mr. Duncan was bound to know was a security in which it was unlawful, by the general principles of law, and in the absence of special authority, for a trustee to invest trust funds. He must therefore, be held chargeable with knowledge that the loan was to be repaid from sources with which the trust could have no connection,

and therefore from sources altogether private to the borrower.

In regard to the bank, the making of ten separate loans to Mr. Jaudon, running through a period of two years, upon the pledge of the stock, evidenced by such certificates, must be held as charging the bank with notice that Mr. Jaudon was borrowing the money for his private uses on a pledge of trust property. The circumstances were such as to put the parties on inquiry; inquiry would have directed them to the *cestia que trust* and the unlawfulness of the transaction would have been disclosed. They made no inquiry even of Mr. Jaudon as to how it was that he was borrowing money on a pledge of shares held by him as trustee. The case is not even one of a sale of the shares directly which might presumably be within the scope of the authority of a trustee, with a view to a re-investment within such authority; a trustee, however, stands on a different footing from an executor or an administrator, or even a guardian in many respects. A trustee presumptively holds his trust property for administration and not for sale, and according to the well-settled principles of equity, a pledge by him of certificates of stock like those in this case, as security for loans of money made to him under circumstances like those in this case, entitled the *cestui que trust* to follow the property into the hands of the pledgee and reclaim it from him, where he has received the fruits of it and there was in fact a breach of trust in making the pledge. The transactions with the pledgee in this case forbid the idea that Mr. Jaudon had any purpose in borrowing the money of selling the stock, and therefore forbid the idea that his action could be that of a trustee selling the stock. He said plainly, by the transactions that he did not wish to sell the stocks; that, as between him and the trust, no such thing as the sale of the stocks was the purpose of the transactions; and that he intended to pay the borrowed money and reclaim the stocks.

The pledgees had reasonable ground for believing

when they made the loans, to pay which the stock was sold, that Mr. Jaudon intended to apply the money loaned to his private uses. They enabled him to commit the breach of trust which he committed. What he did was accomplished by their co operation. The law implies notice to them of the terms of the trust whose existence the certificates disclosed. It was negligence in them to take the certificates in pledge for the loans without inquiry; such inquiry of the plaintiff would have shown that the borrowing of the money was for no purposes of the trust. They must bear the consequences of their negligence, (*McLeod* vs. *Drummond* 17 *Vesey*, 152; *Field* vs. *Scheiffelin*, 7 *Johns, ch. R.* 150; *Lowry* vs. *Commercial and Farmers' Bank, Ch. J., Taney's Decisions*, 310; *Pendleton* vs. *Fay*, 2 *Paige*, 202, 205; *Shaw* vs. *Spencer*, 100 *Mass.*, 382, 389 *to* 392; *Bayard* vs. *Farmers' and Mechanics' Bank*, 52 Penn., 232; Baker *vs.* Bliss, 39 N. Y. 70, 73, 76; *Carr* vs. *Hilton*, 1 *Curtis. C. C. R.*, 390, 393.)

The bill has been taken as confessed against the defendant Samuel Jaudon. There must be a decree that he account for the UnitedStates stock appropriated by him to his own use, with the interest that would have been received thereon and for the 117 shares of the stock of the Canal Company and for the dividends thereon, and that he restore such property to the trust or pay its value into Court. There must also be a decree against the bank and Duncan, Sherman & Co., severally, that they account severally the former for the 47 shares and the latter for the 70 shares of the stock of the Canal Company pledged with them severally and sold, and for all dividends thereon since made, and restore such shares and property to the trust or pay its value into Court. It will be referred to a master to take and state such accounts allowing the proper credits. All other questions are reserved until the coming in of the report of the master.

THERON R. STRONG,
for the plaintiff.
WILLIAM W. McFARLAND,
for DUNCAN SHERMAN & Co.
WILLIAM H. ARNOUX,

K. Tompkins, Printer, 16 Cedar Street, New York.

U. S. Supreme Court.

THE NATIONAL CITY BANK,
Appellant,

against

MARY T. B. JAUDON,
Appellee.

Supplemental brief for the appellee in answer to the brief filed for the above named appellant.

I.

The "Statement of Facts" in the aforesaid brief for said appellant, is in some important particulars unsustained by evidence, and erroneous.

1. As to the reason stated for the discharge of the original trustees and the appointment of Samuel Jaudon (p. 3 of brief).

Mr. S. Jaudon, the trustee charged with the breaches of trust, who has allowed the bill of complaint to be taken as confessed, thereby admitting his misconduct, testified he knew "what was understood to be the reason; that he understood it from Mrs. Jaudon as one of them;" that his recollection was "that she and all the heirs wanted an investment that would produce a larger income, and the first set of trustees were unwilling to make any changes;" that "whether she told me so, I cannot pre-

tend to say;" in answer to a question, "I mean in substance," he testified, "it was her wish and desire as expressed" * * "as expressed to me; yes, sir; it was a plain fact that there was a succession, and the reasons were what I have alluded to" (fols. 154, 155 of record; see also fol. 166).

Mrs. Jaudon testified on that subject: Q. What led them to resign the trust? A. Well, they were old gentlemen, and one of them did not care about holding on. It was a voluntary thing on his part, The other was very far advanced in life, and he was not acceptable to us. Q. The different beneficiaries desired to make a change in the nature of the investments, did they not, thinking it would be more to their advantage? A. Well, sir. I do not remember anything about it, because the executors arranged all that. Q. The executors were? A. My two brothers-in-law. * * * Q. The matter as to the investment of the trust fund, was left by the beneficiaries altogether in the hands of the executors, I understood you? A. Yes, sir." (Fols. 198, 199 of record). Again: "Q. Had the trustees originally appointed to your knowledge, ever refused to change the investment of the estate? A. No, sir, never asked to do it. Q. You don't know anything about it? A. I don't know anything about it. I don't think they were (fol. 206. See 223). Subsequently Mrs. Jaudon, on being asked to explain what she meant by saying the beneficiaries left the matter as to the investment of the trust funds altogether in the hands of the executors, answered, "Well, I presume they had the settlement of the estate, and that they would do it legally and properly; I was not consulted about it; that is all I mean" (fols. 211, 239. See printed brief for complt. p. 21, 22).

2. As to the investment in the Delaware and Raritan Canal Co. stock having been made in accordance with a previous arrangement with Mrs. Jaudon or her and her sisters (p. 4 of brief).

Mrs. Jaudon, the defaulting trustee, testified: "Q. Did you make the investment in the Delaware and Raritan stock with her knowledge and consent? A. I did, sir. Q. What did she say to you on the subject? A. Oh, sir; I cannot of course recollect anything of the kind; our relations were such that I know she considered I was acting very judiciously, and she was very glad of it." (Fols. 153, 154).

Mrs. Jaudon testified on that subject: "Q. Do you remember how it came to be made (referring to the first change in the investment of the funds which was into the Delaware & Raritan Canal Co. Stock) A. I did not know anything except that the change was made by the executors, and was agreeable to ourselves—my sisters and myself. We were not consulted about it (fol. 199). * * * Again: "Q. Did you know before the purchase of this Delaware & Raritan Canal Stock of an intention to purchase it? A. I certainly knew of it, but it was all arranged by the executors. Q. I ask, before the purchase was made? A. No, sir, I did not. I did not know anything about it until after it was done." (Fol. 205). Further: "Q. How soon, to the best of your recollection, after the purchase of this Delaware & Raritan Canal stock were you informed of it? A. Well, I suppose I must have known immediately—brothers told me everything. Q. But you think it was not spoken of in advance to you? A. Oh, no. Q. But on or at the time the purchase was made? A. Yes, I did not know; they arranged that themselves. * * *Q. Have you any recollection you were informed of the purchase of this stock before it had been consummated? A. No. Q. Were you consulted with reference to it? A. No, sir." (Fol. 207. See also fol. 219.) * * On being asked, "Did you have any communication with them about it until after it was made?"—referring to communication with the executors about the first change of investments.—"A. No, sir, I knew nothing about it

whatever. Q. Did you have any communication with them before it was made? A. No, sir." (Fol. 219.) Further, "Q. Before the change of the investment from the Pennsylvania stock to the Delaware and Raritan stock, did you have no conversation with the executors about it? A. No, sir. Q. Was the subject of that change never talked of between you and the executors? A. No, sir. Q. Or any one before it was made? A. No, sir. Q. Do you remember whether the original trustees who resigned were requested to make that change of the investment? A. No, sir, I did not know anything about it." (Fol. 223.)

3. The evidence clearly shows that Mrs. Jaudon's approbation of the first change of investments—from Pennsylvania five per cent. stock to Delaware and Raritan Canal Co. stock—after she had learned of its occurrence, arose wholly from the unreserved confidence she reposed in the executors, her relatives, that they would do what was right and for the best. (Fols. 199 to 203, 218 to 225.) It does not appear she was informed or knew the change could not lawfully be made, or her that rights in respect to the change were explained or known to her; and about that time she became, and ever since has been, a *feme covert*. (Fol. 170.) But whether she had, by subsequent assent or acquiescence, precluded herself from complaining of that change of investment, it is not important to inquire, as she does not complain of it in this action. Although the price paid for the Delaware and Raritan Canal stock was some thirty-five per cent. above par (fols. 152, 222), the investment in it was more profitable than the former investment; and her present complaint is the unlawful appropriation and conversion of that stock. See p. 4 of brief.

4. The investment in the Dauphin Coal stock (fol. 208), which proved a total loss (fol. 209), was made through the executors, without consultation with

Mrs. Jaudon (fols. 209, 210), four or five years before the death of her mother, in 1857 (fol. 215); more than twelve years previous to the misappropriation by S. Jaudon of the Delaware and Raritan Canal stock. (See p. 4, 5, of Brief.)

5. Mr. Samuel Jaudon, in purchasing Broad Top Coal Co. stock, did not act under any general authority he understood had been given to him, in respect to making such re-investment. (See p. 5, 6, of Brief.)

In the first place, his testimony referred to (fol. 157) does not prove any such general authority. In answer to the question, "In general, from conversation with her, were you not at liberty to make such re-investments as in your judgment would increase the income?" Objected to as not calling for the conversation, but for the witness's understanding. "A. That was my general understanding. Any changes that I deemed advisable for her interest would be approved by her." He was asked to state the conversation or language used, and answered, "It is so many years ago, I could not recollect any distinct conversation; only the general impression, as I have it on my mind, that such was the uniform understanding."

Such testimony is not entitled to any weight; but, allowing it the fullest force, it does not prove an authority to make unlawful investments; which is the authority claimed for the trustee. (See King *vs.* Talbot, 40 N. Y., 76.)

In the next place, the purchase of this Broad Top Coal stock by S. Jaudon was made in his individual name and on his individual account (fols. 139, 140). No investment was made in either for Mrs. Jaudon. He had great expectations in regard to its prospective productiveness and value, and intended in future, on its becoming attractive, to offer it to Mrs. Jaudon; but he never made the offer. (Fols. 168, 171, 172.)

Again, Mr. S. Jaudon testified that after the investments in the Delaware and Raritan Canal Co. stock, there was no conversation between him and Mrs. Jaudon in reference to changing those investments; no discretion was given to him in reference to those stocks; nothing ever passed between them in reference to those stocks (fols. 166, 167). "Q. Was there any conversation between you and Mrs. Jaudon, after the purchase of these stocks, in reference to your having a discretion as to reinvestments which embraced these particular stocks? A. No conversation whatever, referring to these securities; none at all, which I considered, because such a thing was not in contemplation at any time I had a conversation (fol. 167).

Mrs. Jaudon testified: "Q. Did you ever authorize or consent to a sale, or pledge, or other disposition of the investment in the Delaware and Raritan Canal Co.'s stock?" * * "A. No, sir. Q. Were you ever at any time consulted in reference to a sale or pledge, or other disposition of any of those stocks? A. No, sir. Q. Did you know of any sale, or pledge, or other disposition, of any of those stocks, before it had actually been made, as stated in the complaint? A. No, sir. Q. Did you then, or at any time thereafter, directly or indirectly, approve of it? A. No, sir." (Fols. 195, 196.) She further testified her consent to it was never asked or given; that she did not know or learn of a pledge or hypothecation of the stocks until in December, the year after the stocks had been sold. (Fols. 196, 197.)

6. The only investments made by S. Jaudon were the proceeds of a sale of the Pennsylvania lives in the Delaware and Raritan Canal Co. stock; the proceeds of Philadelphia and Ohio stock into the Dauphin stock; and the purchase of the $5,600 Government securities. (Fol. 213.)

II.

The demurrer of the appellant has no merit.

1. The bill is not multifarious. (See the original brief filed for the appellee for the reasons, p. 25.)

The case of McGachen *vs.* Dew, 15 Beavan, 84, only decides on this subject: "Two classes of trustees had committed a breach of trust. Held that the *cestui que trust* might proceed against the one class without making the other class parties."

2. The complainaint had legal capacity to sue. She was entitled to the income of the stock for her life, and was the equitable owner of the stock to that extent; and she might maintain a suit for redress for the breaches of trust in question, and the protection of her rights as aforesaid. The proposition of want of legal capacity to sue, and that the proper course was to have a new trustee appointed, and for him to file a bill would deprive the *cestui que trust* of any remedy. If she had not legal capacity to sue, she could not sue for the removal of Mr. S. Jandon as trustee, and the appointment of another in his place, which is part of the relief sought by the bill.

3. The complaint is not obnoxious to the objection that it does not state facts sufficient to constitute a cause of action.

In respect to the right of action, it is of no moment whether the investment in the Delaware and Raritan Canal Co. stock was authorized by the bill or by the laws of Pennsylvania; or whether there was authority to sell and re-invest at the time alleged; if the trustee invested in that stock without authority, and without the consent of the *cestui que trust*, the latter might claim the stock as belonging to the trust at her election; if she had consented, the stock would by the act of the parties belong to the trust in like manner as if the investment in it had been author-

ized by the will. Her election in the former case, and her consent in the latter, would as to the parties, make the investment in that stock the same in legal effect, as any fully authorized and proper investment. This principle is elementary and needs not for its support the citation of authorities; none of the cases cited for the appellant, in any respect controvert it. (See further under the following points.)

III.

Assuming that the sale of the Pennsylvania fives, and the investment of the proceeds, by Samuel Jaudon, in the Delaware and Raritan Canal Company Stock was a breach of trust, the principle stated under the third subdivision of the last preceding point, applies to the case. The latter stock did not thereby become the property of the trustee relieved of the trust, and without right by the *cestui que trust* to follow it, and treat it as part of the trust funds. The trustee could not by his wrongful act divest the beneficial title of the *cestui que trust* to the original stock, or its proceeds thus invested; on the contrary, the latter might pursue them into the new investment and assert her right to the new stock as the substitute for the Pennsylvania fives, and their proceeds. She had an election to treat the unlawful investment as a conversion, and require the trustee to restore the original stock or its proceeds to the trust, or claim the new stock, thus adopting the investment in it, and waiving the breach of trust.

The position that the addition to the name of Samuel Jaudon in the stock certificates of the words "trustee for Mrs. T. B. Jaudon," is merely *descriptio personæ*, and not notice to the appellant that Mr. S. Jaudon held the stock as trustee for Mrs Jaudon, or sufficient to put the appellant on inquiry as to her rights, is unsound in principle, contrary to numerous cases, and without a case or dictum in support of it. It was properly summarily overruled in the Court below.

The appellant admits in its answer that the certificate for the forty-seven shares of stock was not the property of Samuel Jaudon in his own right, &c (fol. 55) but were held by him in trust, &c. (fols. 58, 59).

IV.

The act of Samuel Jaudon complained of in this action cannot with any propriety be said to be the direct consequence of making sale of the Pennsylvania fives, nor was that act a breach of trust as to the appellee if, as alleged by the third point, for the appellant, it was concurred in by her; and the statement in the first subdivision of that point, is, as has herein been shown, unwarranted by the evidence.

The position of the third point for the appellant is not sustained by any of the cases cited in support of it.

Fyler *vs.* Fyler, 3 Beavan 550, is cited as analogous, but has no application. The case was this as stated in the notes: "A person knowingly inducing trustees to lend trust money to his debtor on a security not warranted by the trusts, in order that when advanced such person may obtain payment thereon of his debt, is accountable to the *cestui que* trust."

Solicitor knowingly procuring trustees to commit a breach of trust for his benefit, must be considered a partaker in his breach of trust.

Trustees investing trust money on an unauthorized security are responsible for any future loss traceable to that first error.

A trustee who was not authorized to lend the trust money on leasehold security, applied to his solicitors to procure an investment for some trust money, so as to produce a larger income. The solicitors had a cli-

ent was considerably indebted to them and who wanted to borrow money on leasehold security, and they proposed it to the trustee. The trustee personally took measures to ascertain the value and validity of the security, and thereupon advanced the money, which was paid to the solicitors, and carried to the credit of their debtor's account. The solicitors acted on behalf of the borrower, and, to some extent, for the trustee, but another solicitor also acted for him for one of the *cestui que trusts* in the matter; the solicitors had notice that the fund was trust money, in which infants were interested, but had no knowledge of the trusts or of the limited powers of the trustees. The security turned out ample, but part of the trust funds was afterwards lost by being transferred to a similar security of the same party. The lending on leaseholds being a breach of trust—held, that the solicitors were not liable to the *cestui qui trusts* for the loss.

In the answer to a bill for relief in respect to a breach of trust, it was alleged that some of the *cestui qui trusts* had assented thereto. Held, the parties sought to be charged were entitled to an inquiry."

It is stated in the case (page 553) that the leasehold security was sold for nearly £10,000; the purchase money was consequently ample to provide for the mortgage, but it having been stipulated, that in case of a sale of that property the mortgagor should retain the £6,000 on giving security on other leasehold property to the satisfaction of the mortgagees and their solicitors; the mortgage money was not paid off, but was retained by the mortgagor on another substituted security of leasehold property, which was afterwards sold and another leasehold house was substituted, and on the sale of the latter a sum of £1,500 was received by the trustees.

This stipulation implicated the cestui qui trust in the several illegal investments and breaches of trust by expressly authorizing the same.

The Master of the Rolls (pp. 559, 560), said, "It is said by some of the parties in answer to this bill, that

although these proceedings in respect to the trust money must be admitted to have been irregular because there was no authority at all to change the security, yet it was done manifestly for the advantage of one of the *cestui qui trusts*, and with the consent of some of the others; and, if that were so—if all this has taken place with the consent of the parties now complaining, it certainly appears to me that they would not have any right to maintain this suit, for *volenti non fit injuria*. If they have authorized this course of dealing with their own fund, it would be in the highest degree unjust to permit them to establish a claim against those who have acted under their authority."

The breach of trust alleged in this case, as against the appellant, is the pledge of the Delaware and Raritan Canal Co. stock to secure loans by the appellant to S. Jaudon, the trustee, in his private capacity and for his private use, made without the consent or knowledge of the *cestui que trust;* and on which pledge the stock was sold, and the proceeds applied to pay the private debt of the trustee; and the relief sought is to have that stock, or its value, restored to the trust.

Keeping this in view, and referring to the original brief of the appellee, no further observations are necessary in regard to the third, fourth, or fifth points of the appellant.

V.

The appellant was charged with knowledge of the rights of the appellee, by what appeared on the face of the stock certificates—received by it in pledge for the security of its loans; and that such dealings were in violation of her rights, and hence was implicated in the breach of trust.

The appellant cannot claim as a purchaser.

The supposed case in the 4th subdivision of the sixth point for the appellee looks too far and too gloomily into the future. At present the practical question is whether the Delaware and Raritan Canal stock, or its proceeds, shall be restored to the trust. If that shall be done no apprehension need be felt that the persons who may be interested in the remainder after the life interest will make trouble. What ground of complaint by them would exist?

VI.

The position of the seventh point for the appellant is unsound. The entire 117 shares of stock were held by the trustee in trust for the appellee. If, as to a portion of that stock she had the beneficial interest absolutely, it was none the less held in trust for her, and no question as to whether she might claim more than a life interest is of any concern to the appellant in this case.

STRONG & SHEPARD,
Solicitors for Appellee.

THERON R. STRONG,
of Counsel.

1. Larger Acquisition $10-
Lesser in Trust - 6 11 -

daughter Louisa A. W. Bainbridge, and on her demise, I request it be given to her oldest serviving son, and if no son, to her oldest surviving daughter.

Tenthly. I bequeath to my son-in-law, Captain Thomas Hayes, all my nautical books and nautical charts.

Eleventhly. All my books, paintings, portraits, engravings,
232 swords, pistols, and canes, I may die possessed of, which are not otherwise disposed of in this instrument of writing, I bequeath to my aforementioned daughters to be divided among them in such manner as a majority of them shall decide, except the portrait of Robert C. Ludlow, which I bequeath to my godson, William Bainbridge Ludlow.

Twelfthly. I bequeath to William Bainbridge Curtis, the son of Asa Curtis, who was with me in the action of the Java, fifty dollars, in consideration of the brave and good conduct of his father in that action, and of his uniform meritorious conduct from thence to the present time.

Thirteenthly. I bequeath to my executors hereinbefore named, to Doctor Thomas Harris, of the U. S. Navy, and to Aaron Wolff, each of them the sum of fifty dollars to purchase a snuff-box, which they are requested to accept as a memento of my sincere friendship for them.

Fourteenthly. I do direct all my real estate, which I may die possessed of, to be sold as soon after my demise as conveniently can be done.

Fifteenthly. I do hereby appoint my friends, William Lynch and Hugh Calhoun, two of my executors, as trustees to receive all the residue of my estate whatsoever, and to invest the same in the stocks of the United States, or the stock or funds of any individual State,
233 and to hold the same in trust for the following purposes:

First. I direct that twenty-eight thousand dollars be invested as aforesaid, as the trustees may see fit, the interest thereof to be paid to my beloved wife, Susan Bainbridge, during her natural life for her sole use and benefit, and at the end of her natural life the said stocks or funds to be equally divided, share and share alike, between my daughters Susan P. Hayes, Mary T. Bainbridge, Lucy Ann Bainbridge, and Louisa Alexina W. Bainbridge, the trust to remain the same for their sole use and benefit. In the event of any of their demise before the end of my wife, Susan Bainbridge' natural life, and leaving children, the said children are then to have the portion which their parent would be entitled to by this bequest. The above to my wife, Susan Bainbridge, is in lieu of dower.

Secondly. I direct the trustees to invest so much of my estate in the manner aforesaid, named as to create an interest annually of one hundred and fifty dollars, which interest I bequeath to my sister Mary Bainbridge, during her natural life. The aforesaid one hundred and fifty dollars to be paid to her annually in semi-annual payments by my aforesaid trustees. At her demise the invested amount to be in trust, equally divided between my daughters aforenamed, and in the event of any of their decease before the end of my sister, Mary Bain-
234 bridge' natural life, and leaving children, the said children are then to have the portion which their parent would be entitled to by this bequest.

Thirdly. I do hereby direct my trustees to invest in such funds or stocks as has heretofore in this instrument been directed, the equal one-fourth part of my remaining estate in trust, the interest whereof to be paid to my daughter Susan P. Hayes, for her sole use and benefit dur-

acquainted with his handwriting, having seen him write his name, as well as other matters; that he has viewed the signature "W'm Bainbridge," subscribed to said will and codicil, and verily believes the same to be the proper handwriting and signature of him, the said William Bainbridge, to the best of knowledge and belief.

(Signed) PATRICK HAYES.

Sworn and subscribed before me the date above.

(Signed) J. B. SEWALL,
Dep't. Register.

PHILAD'A, *August 3rd*, 1833.

There personally appeared Aaron Wolff, one of the witnesses to the foregoing present, second codicil, and on his oath did say that he
240 was present, and did see and hear William Bainbridge, the testator in the said codicil named, sign, seal, publish, and declare the same as and for a codicil to his last will and testament, and that at the doing thereof he was of sound mind, memory, and understanding, to the best of his knowledge and belief.

(Signed) J. HUMES, *Register.*

PHILAD'A, *August 3rd.*

There personally appeared Agnes Maclean, (John Maclean, one of the witnesses to the foregoing codicil, being absent from the State of Pennsylvania,) and on her oath did say that she is acquainted with John Maclean, and with his handwriting, having seen him write his name, as well as other matters; that she has viewed the signature "John Maclean," subscribed as a witness to said codicil, and verily believes the same to be the proper handwriting and signature of him, the said John Maclean, to the best of *his* knowledge and belief.

(Signed) AGNES MACLEAN.

Sworn and subscribed before me the date above.

J. B. SEWALL,
Dep't. Register.

241 AUGUST 3RD, 1833.

Tho's Hayes, one of the executors, swore that he would diligently and faithfully regard, and well and truly comply with, the provisions of the law relating to collateral inheritance, and letters testamentary granted unto him.

AUGUST 8TH.

W'm Lynch, Hugh Calhoun, and Ashbel G. Jaudon, the other executors, sworn, &c.

MARCH 19TH, 1834.

I renounce and declare to take upon myself the burthen of the execution of this will.

(Signed) SAM'L P. WHETHERILL.

COMMONWEALTH OF PENNSYLVANIA,
City and County of Philadelphia:

REGISTER'S OFFICE, *August 11th*, 1870.

I, J. Alexander Simpson, register of wills for the city and county of

Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a true and accurate copy of the last will and testament of William Bainbridge, deceased, together with the probate thereof, upon which letters testamentary were duly granted unto Tho's Hayes, W'm Lynch, Hugh Calhoun, and Ashbel G. Jaudon, the executors therein named, on the 3rd day of August, 1833, as the same
242 remains on file and of record in this office, (the word "William" on the fifth line from the foot of last page written over erasure.)

In testimony whereof witness my hand and seal of office at Philadelphia, the date above.

[SEAL.] J. ALEXANDER SIMPSON,
Register of Wills.

[5-ct. U. S. int. revenue stamp, can.]

PENNSYLVANIA,
City and County of Philadelphia:

I, Joseph Allison, esquire, president of the first judicial district of Pennsylvania, and presiding judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace, for the city and county of Philadelphia, do certify, that J. Alexander Simpson, by whom the annexed record, certificate, and attestation were made and given, and who in his own proper handwriting, has hereunto subscribed his name, and affixed his official seal, was at the time of so doing, and now is, register for the probate of wills, and granting letters of administration, in and for the city and county of Philadelphia, in the Common-
243 wealth of Pennsylvania, duly commissioned and qualified, to all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as thereout, and that the said record, certificate, and attestation are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand the eleventh day of August, eighteen hundred and seventy.

JOSEPH ALLISON.

CITY AND COUNTY OF PHILADELPHIA:

I, Richard Donagan, esquire, prothonotary of the court of common pleas, for the city and county of Philadelphia, do certify that the honorable Joseph Allison, esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, president of the first judicial district of Pennsylvania, and president judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of justice as elsewhere.

244 In testimony whereof I have hereunto set my hand and affixed the seal of the said court, the eleventh day of August, eighteen hundred and seventy.

[SEAL.] R. DONAGAN,
Prothonotary.

[5-cent. U. S. int. rev. stamp, can.]

(Endorsed:) Complainant's Exhibit No. 1, Sept. 20, 1870. Jaudon vs. Jaudon et al. Copy will of William Bainbridge, dec'd.

ing her natural life, and at the end of her natural life the amount, so invested, to be equally divided between her children.

Fourthly. I do hereby direct my trustees to invest in such funds or stocks as has heretofore in this instrument been directed, the equal one-fourth part of my remaining estate in trust, the interest whereof to be paid to my daughter, Mary T. Bainbridge, for her sole use and benefit during her natural life, and at the end of her natural life, the amount so invested, to be equally divided between her children.

Fifthly. I do hereby direct my trustees to invest in such funds or stocks as heretofore in this instrument been directed, the equal one-fourth part of my remaining estate in trust, the interest whereof to be paid to my daughter Lucy Ann Bainbridge, for her sole use and benefit during her natural life, and at the end of her natural life, the
235 amount so invested to be equally divided between her children.

Sixthly. I do hereby direct my trustees to invest in such funds or stocks as has heretofore, in this instrument, been directed, the equal one-fourth part of my remaining estate in trust, the interest whereof to be paid to my daughter Louisa Alexina W. Bainbridge, for her sole use and benefit during her natural life, and at the end of her natural life, the amount so invested to be equally divided between her children.

Lastly. This will having been drawn up by myself, may be deficient in technicalities of the law. It, however, contains the distribution of my property, and the manner I wish it distributed. I therefore trust that this declaration, made in sound mind and in the presence of my God, will prevent all litigation or misunderstanding between my heirs named in this instrument of writing, it being my last will and testament, revoking all former wills.

In testimony whereof I hereunto publish the same, sign my name thereunto, and affix my seal this fifteenth day of June, anno Domini one thousand eight hundred and thirty-two.

(Signed) W. BAINBRIDGE. [L. S.]

Signed, sealed, published, and delivered in the presence of us—
(Signed) THO'S BREESE.
THO'S HAYES.
AARON WOLFF.

236 CODICIL.—To this my last will and testament, the foregoing instrument, the trustees therein named, William Lynch and Hugh Calhoun, are to receive from my executors the residue of my estate, and to invest the same in the stock of the U. States, or the stock or funds of any individual State. It would follow that the loan which I may hold of the city of Philadelphia and of the Southwark loan, and the ground rents which I may die possessed of, would be sold, but which is not my meaning or intention. I do direct that my trustees will consider such property as above named as equal to U. S. States or State loan, or stocks, as above specified.

In testimony whereof I hereunto publish and declare this codicil to be my act, and sign my name thereunto as my intention and meaning, this twenty-ninth day of June, A. D. 1832.

(Signed) W. BAINBRIDGE.

Signed in our presence and witnessed by us—
(Signed) THO'S HAYS.
AARON WOLFF.

I do make and publish this instrument as my codicil to my last will and testament, and I do direct as follows:

First. That my executors purchase a handsome silver waiter, to the value of sixty dollars, to be richly carved, with an inscription in the centre of the waiter, stating it to be a present from Comm. W'm
237 Bainbridge to Doctor Thomas Harris, as a further mark of my high regard and esteem for his constant, unwearied, and affectionate attention during my present illness.

Secondly. I direct my executors to purchase a gold snuff-box, to the value of fifty dollars, and to have engraved on the same, from Comm. W'm Bainbridge to Doctor N. Chapman, and present the same to Doctor N. Chapman, as a testimony of my personal regard and esteem.

Thirdly. I direct my executors to purchase a handsome silver pitcher, to the value of sixty dollars, and to have engraved on the same, from Comm. W'm Bainbridge to Doctor George N. Sprotson, as a testimony of my personal regard and esteem for himself and of his professional services during my last illness at the navy yard, Charlesto'n.

Fourthly. I do hereby appoint and substitute in the place and stead of Hartman Kuhn, originally named in my last will and testament as one of my executors, my son-in-law Ashbel Green Jaudon, he Ashbel Green Jaudon to be the executor of my last will and testament, and annulling the appointment of Hartman Kuhn.

Lastly. I direct my executors to carry this codicil into effect as soon as conveniently can, and to present the articles named to the persons named.

238 In testimony whereof I do publish this as my codicil to my last will and testament, this second day of July, A. D. 1833, and subscribe the same as my hand and seal.

(Signed) W'M BAINBRIDGE. [SEAL.]

Witnesses present at signing, sealing, and publishing:
(Signed) JOHN MACLEAN.
AARON WOLFF.

PHILAD'A, *August 2nd.*

There personally appeared Thomas Breeze, one of the witnesses in the foregoing will, and on his oath did say that he was present, and did see and hear William Bainbridge, the testator in the foregoing will named, sign, seal, publish, and declare the same as and for his last will and testament; and that at the doing thereof he was of sound mind, memory, and understanding, to the best of his knowledge and belief.

Also, on the 3rd August, 1833, personally appeared Aaron Wolff, the other witness to the foregoing will, and also witness to the codicil thereto, and on his oath did say that he was present, and did see and hear William Bainbridge, the testator in the said will and codicil named, sign, seal, publish, and declare the same as and for his last will
239 and testament and codicil thereto, and that at the doing thereof he was of sound mind, memory, and understanding, to the best of his knowledge and belief.

(Signed) J. HUMES, *Register.*

PHILAD'A, *August 2nd*, 1833.

There personally appeared Patrick Hayes, (Thomas Hayes, one of the witnesses in the foregoing will and codicil, being one of the executors,) and on his oath did say that he was acquainted with William Bainbridge, the testator in the said will and codicil named, in his life-time, and is

acquainted with his handwriting, having seen him write his name, as well as other matters; that he has viewed the signature "W'm Bainbridge," subscribed to said will and codicil, and verily believes the same to be the proper handwriting and signature of him, the said William Bainbridge, to the best of knowledge and belief.

(Signed) PATRICK HAYES.

Sworn and subscribed before me the date above.

(Signed) J. B. SEWALL,
Dep't. Register.

PHILAD'A, *August 3rd*, 1833.

There personally appeared Aaron Wolff, one of the witnesses to the foregoing present, second codicil, and on his oath did say that he
240 was present, and did see and hear William Bainbridge, the testator in the said codicil named, sign, seal, publish, and declare the same as and for a codicil to his last will and testament, and that at the doing thereof he was of sound mind, memory, and understanding, to the best of his knowledge and belief.

(Signed) J. HUMES, *Register.*

PHILAD'A, *August 3rd.*

There personally appeared Agnes Maclean, (John Maclean, one of the witnesses to the foregoing codicil, being absent from the State of Pennsylvania,) and on her oath did say that she is acquainted with John Maclean, and with his handwriting, having seen him write his name, as well as other matters; that she has viewed the signature "John Maclean," subscribed as a witness to said codicil, and verily believes the same to be the proper handwriting and signature of him, the said John Maclean, to the best of *his* knowledge and belief.

(Signed) AGNES MACLEAN.

Sworn and subscribed before me the date above.

J. B. SEWALL,
Dep't. Register.

241 AUGUST 3RD, 1833.

Tho's Hayes, one of the executors, swore that he would diligently and faithfully regard, and well and truly comply with, the provisions of the law relating to collateral inheritance, and letters testamentary granted unto him.

AUGUST 8TH.

W'm Lynch, Hugh Calhoun, and Ashbel G. Jaudon, the other executors, sworn, &c.

MARCH 19TH, 1834.

I renounce and declare to take upon myself the burthen of the execution of this will.

(Signed) SAM'L P. WHETHERILL.

COMMONWEALTH OF PENNSYLVANIA,
City and County of Philadelphia:

REGISTER'S OFFICE, *August 11th*, 1870.

I, J. Alexander Simpson, register of wills for the city and county of

Philadelphia, in the Commonwealth of Pennsylvania, do hereby certify the foregoing to be a true and accurate copy of the last will and testament of William Bainbridge, deceased, together with the probate thereof, upon which letters testamentary were duly granted unto Tho's Hayes, W'm Lynch, Hugh Calhoun, and Ashbel G. Jaudon, the executors therein named, on the 3rd day of August, 1833, as the same
242 remains on file and of record in this office, (the word "William" on the fifth line from the foot of last page written over erasure.)

In testimony whereof witness my hand and seal of office at Philadelphia, the date above.

[SEAL.] J. ALEXANDER SIMPSON,
Register of Wills.

[5-ct. U. S. int. revenue stamp, can.]

PENNSYLVANIA,
City and County of Philadelphia:

I, Joseph Allison, esquire, president of the first judicial district of Pennsylvania, and presiding judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace, for the city and county of Philadelphia, do certify, that J. Alexander Simpson, by whom the annexed record, certificate, and attestation were made and given, and who in his own proper handwriting, has hereunto subscribed his name, and affixed his official seal, was at the time of so doing, and now is, register for the probate of wills, and granting letters of administration, in and for the city and county of Philadelphia, in the Common-
243 wealth of Pennsylvania, duly commissioned and qualified, to all whose acts as such, full faith and credit are and ought to be given, as well in courts of judicature as thereout, and that the said record, certificate, and attestation are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand the eleventh day of August, eighteen hundred and seventy.

JOSEPH ALLISON.

CITY AND COUNTY OF PHILADELPHIA:

I, Richard Donagan, esquire, prothonotary of the court of common pleas, for the city and county of Philadelphia, do certify that the honorable Joseph Allison, esquire, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, president of the first judicial district of Pennsylvania, and president judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of justice as elsewhere.

244 In testimony whereof I have hereunto set my hand and affixed the seal of the said court, the eleventh day of August, eighteen hundred and seventy.

[SEAL.] R. DONAGAN,
Prothonotary.

[5-cent. U. S. int. rev. stamp, can.]

(Endorsed:) Complainant's Exhibit No. 1, Sept. 20, 1870. Jaudon vs. Jaudon et al. Copy will of William Bainbridge, dec'd.

The within is an exhibit given in evidence on the part of the complainant, in the progress of her testimony, which is hereto annexed.
The exhibit is marked No. 1.

THERON GEO. STRONG,
Notary Public N. Y. Co.

245 At a court of common pleas, held on the 20th of day May, A. D. 1835, a petition was presented in the following words:

To the honorable judges of the court of common pleas for the city and county of Philadelphia:

The petition of William Lynch and Hugh Calhoun, trustees of Mrs. Susan Bainbridge and others, respectfully sheweth:

That your petitioners, under the last will and testament of the late William Bainbridge, of the city of Philadelphia, deceased, bearing date the 15th day of June, A. D. 1832, and upon which letters-testamentary were issued the 3rd day of August, A. D. 1833, were appointed trustees of the widow of the testator, Mrs. Susan Bainbridge, of his sister Mary Bainbridge, of his daughters Susan P. Hayes, (wife of Thomas Hayes,) Mary T. Bainbridge, Lucy Ann Jaudon, (wife of Ashbel Green Jaudon,) and Louisa Alexina W. Bainbridge, for certain purposes in the said will declared.

That your petitioners having discharged the duties of the said respective trusts, from their appointment to the present time, are desirous of being discharged from the further execution of the same.

246 They therefore pray leave of this honorable court to make a settlement of their accounts so far as they have proceeded in the execution of the said respective trusts, and to surrender the residue of the respective estates thereto appertaining under their care, to such person or persons as the said court may appoint.

They further pray your honorable body that, in the appointment of such person or persons, you will make an order, dismissing them from the duties of their appointment.

And your petitioners, as in duty bound, &c.

WILLIAM LYNCH.
HUGH CALHOUN.

I agree that the accounts of Hugh Calhoun and William Lynch, under the will of Commodore Bainbridge, as exhibited to the district court, are correct, and do require the same to be audited.

MARY BAINBRIDGE.

NEW YORK, 19*th May*, 1835.

I consent that Mr. Samuel Jaudon, be appointed trustee under the will of the late Com. Bainbridge, in place of the discharged trustees, without security.

May 30, 1835.

MARY BAINBRIDGE.

247 In the matter of William Lynch & Hugh Calhoun, late trustees under the will of Com. W'm Bainbridge, dec'd.

On motion of H. Binney, jr., and the receipt of Samuel Jaudon, the present trustee for the trust estate and effects, being filed, ordered by the court, that William Lynch & Hugh Calhoun be absolutely discharged from the duties of their appointment as trustees under the will of William Bainbridge, dec'd.

I, Samuel Jaudon, appointed by the court of common pleas, trustee, (under the will of the late W'm Bainbridge, dec'd,) of Mrs. Susan Bainbridge, Mary Bainbridge, Mary T. Bainbridge, Susan P. Hayes, Lucy Ann Jaudon, and Louisa A. W. Bainbridge, do acknowledge to have received from Hugh Calhoun and William Lynch, late trustees of the said parties, all the trust estate and effects of every description, received by the said trustees from the executors of the said will or otherwise, and held by them under the aforesaid trust.

S. JAUDON, *Trustee.*

PHIL., *June 26th*, 1835.
Filed Sept. 12, 1835.

248 *Docket entries.*

1835.

In the matter of Susan Bainbridge—trust estate.

May 20, 1835. Petition of Wm. Lynch & Hugh Calhoun, trustees of Mrs. Bainbridge, & their accounts as trustees filed, and on motion of H. Binney, jr., esq., the court order' that the petitioners be discharged, upon securing the balance to be due on their accounts.

May 29th, 1835. Petition of Susan Bainbridge filed, and on motion of James Kittera, esq., the court appointed Samuel Jaudon trustee, without security.

Sept. 12, 1835. On motion of H. Binney, jr., & filing receipt of S. Jaudon, present trustee, ordered, that W'm Lynch & Hugh Calhoun be absolutely discharged from the duties of their appointment as trustees under the will of W'm Bainbridge, dec'd.

Court of common pleas.

STATE OF PENNSYLVANIA,
County of Philadelphia:

I hereby certify that the above is a true and correct copy of the record and docket entries in the above matter, except the petition of Susan Bainbridge, filed May 29th, 1835, and motion and order thereon appointing "Samuel Jaudon trustee, without security," which are missing, and which, after dilligent search, cannot be found in the office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court this 25th day of August, A. D. 1870.

R. DONAGAN,
Prothonotary.

249 PENNSYLVANIA, *City and County of Philadelphia:*

I, Joseph Allison, president of the first judicial district of Pennsylvania, and presiding judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, do certify that Richard Donagan, by whom the annexed record, certificate, and attestation were made and given, and who, in his own proper handwriting, has thereunto subscribed his name and affixed his official seal, was at the time of so doing, and now is, prothonotary of the court of common pleas, in and for the city and county of Philadelphia, in the Commonwealth of Pennsylvania, duly commissioned and

qualified, to all whose acts as such, full faith and credit are and ought to be given, as well in the courts of judicature as thereout; and that the said record, certificate, and attestation, are in due form and made by the proper officer.

In testimony whereof I have hereunto set my hand, the 26th day of August, eighteen hundred and seventy.

JOSEPH ALLISON.

250 CITY AND COUNTY OF PHILADELPHIA, *ss:*

I, Richard Donagan, prothonotary of the court of common pleas, for the city and county of Philadelphia, do certify that the honorable Joseph Allison, by whom the foregoing attestation was made, and whose name is thereto subscribed, was at the time of making thereof, and still is, president of the first judicial district of Pennsylvania, and president judge of the court of common pleas, orphans' court, and court of general quarter sessions of the peace for the city and county of Philadelphia, duly commissioned and sworn, to all whose acts as such, full faith and credit are and ought to be given, as well in courts of justice as elsewhere.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, the 26th day of August, eighteen hundred and seventy.

R. DONAGAN,
Prothonotary.

(Endorsed:) Court of common pleas, (Philadelphia.) In the matter of the appointment of S. Jaudon, trustee. Ex. copy proceedings & record. Complainant's exhibit No. 2. Sept. 20, '70. Jaudon vs. Jaudon.

The within is an exhibit given in evidence on the part of the complainant in the progress of her testimony, which is hereto annexed. The exhibit is marked No. 2.

THERON GEO. STRONG,
Notary Public N. Y. Co.

251 (Endorsed:) U. S. circuit court. Mary T. B. Jaudon, by her next friend, against William B. Duncan et al. Deposition of complainant, & Exhibits Nos. 1 & 2. Strong & Shepard, attorneys for complainant, 90 Broadway, New York. Filed Oct. 8, '70.

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253 At a stated term of the circuit court of the United States of America for the southern district of New York, held at the United States court-house in New York City, on the 31st day of May, in the year of our Lord one thousand eight hundred and seventy-one—Present, the honorable Samuel Blatchford, judge.

MARY T. B. JAUDON, BY HENRY M. TABER, her next friend,
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon.

This cause came on to be heard at this term and was argued by coun-

sel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed as follows, viz:

That the defendant Samuel Jaudon, account for the value of the United States stocks in the bill of complaint mentioned, belonging to the trust in favor of the complainant therein stated, appropriated by him to his own use, as in the bill of complaint set forth, with the interest
254 that would have been received on said United States stocks, and on the several instalments of interest, if those stock' had not been so appropriated and diverted by him from said trust; also, that he account for the value of the forty-seven, and seventy, making an aggregate of one hundred and seventeen, shares of stock of the Delaware and Raritan Canal Company, in the bill of complaint mentioned, appropriated by him to his own use, as therein stated, with the dividends and other proceeds that would have been received thereon, including interest on said dividends, if the stock had not been so appropriated and diverted from the said trust, crediting to the said Samuel Jaudon, however, the sum of five hundred and eighty-five dollars paid by him to the complainant on or about February 1st, 1868, and the further sum of two hundred and five dollars paid by him to the complainant, on or about August 1st, 1868, and that the defendant Samuel Jaudon, forthwith restore the said stocks to the said trust, and bring them into court for and on account of said trust, in place of the value thereof to be found in such accounting; and forthwith bring into court and pay any balance to be found against him on such accounting, for and on account of and to restore the same to the said trust, or in case he shall not so as aforesaid restore the
255 said stocks and balance to the said trust, that he pay and bring into court, for and on account of and to restore the same to the trust, the amount that shall be found against him on the said accounting, with interest thereon.

That the defendants William B. Duncan, David Duncan, and William Watts Sherman, account for the value of the seventy shares of stock of the Delaware and Raritan Canal Company hypothecated to them and caused to be sold by them, as in the bill of complaint mentioned and stated, with the dividends and other proceeds that would have been received thereon, including interest on said dividends if that stock had remained with and not been diverted from said trust; and that the said William B. Duncan, David Duncan, and William Watts Sherman, forthwith restore the said seventy shares of stock to the said trust and bring them into court for and on account of said trust in place of the value thereof to be found on such accounting; and forthwith pay and bring into court any balance to be found against them on such accounting, for and on account of and to restore the same to the said trust; or in case they shall not so as aforesaid restore the said seventy shares of stock and said balance to the said trust, that they pay and bring
256 into court, for and on account of and to restore the same to the said trust, the amount that shall be found against them on said accounting, with interest thereon.

That the defendant The National City Bank, account for the value of the forty-seven shares of stock of the Delaware and Raritan Canal Company hypothecated to it and caused to be sold by it, as in the bill of complaint mentioned and stated, with all dividends and other proceeds that would have been received thereon, including interest on said dividends if that stock had remained with and not been diverted from the said trust; and that the said The National City Bank forthwith restore the said forty-seven shares of stock to the said trust and bring them into court for and on account of the said trust in place of the value

thereof to be found on such accounting; and forthwith pay and bring into court any balance to be found against it on such accounting, for and on account of and to restore the same to the said trust, or in case it shall not so as aforesaid restore the said forty-seven shares of stock and said balance to the said trust, that it pay and bring into court for and on account of and to restore the same to the said trust the
257 amount that shall be found against it in the said accounting, with interest thereon.

That it be referred to Kenneth G. White, esq., a master of this court, to take and state the accounts between the parties and make report thereof to this court.

All other questions and directions are reserved until the coming in of the report of the master.

It is declared to be the intention and construction of this decree that a restauration to the trust of the seventy shares or of the forty-seven shares of stock before named with the dividends, proceeds, and interest thereon, before named, by any one of the defendants shall satisfy this decree as to the property so restored as between all the defendants and the trust.

SAM'L BLATCHFORD.

(Endorsed:)

NEW YORK, *May* 23, 1871.

Service of a copy of the within and of the notice of settlement endorsed is hereby admitted.

BOWDOIN, LAROCQUE & BARLOW,
Sol'rs for Duncan, Sherman & Co.
MERRIHEW & ARNOUX,
Sol'r for Nat. City Bank.
JOHN P. CROSBY, *Sol'r for S. Jaudon.*

258 U. S. circuit court. Mary T. B. Jaudon vs. Samuel Jaudon & o'rs. Decree. Strong & Shepard, sol'rs for compl't, 90 Broadway, N. Y. Rec'd May 23d, 1871. Ent'r'd.

GENTS: Please take notice that the within proposed decree will be presented for settlement to Hon. S. Blatchford at the U. S. court-house on Saturday, the 27th inst., at 11 a. m.

Y'rs,

STRONG & SHEPARD.

To BOWDOIN, LAROCQUE & BARLOW.
Filed June 1, 1871.

259 United States circuit court, southern district of New York.

MARY T. B. JAUDON
ag'st
SAMUEL JAUDON & OTHERS.

In order to save the labor and expense of proceedings before a master, to take and state the accounts provided to be taken and stated by the decree in this cause, it is stipulated and agreed by and between the solicitors of the respective parties as follows, to wit:

First. The solicitor for the defendant Samuel Jaudon stipulates and agrees that the statement of the account hereto annexed, in respect to the said Samuel Jaudon, is correct, according to the said decree.

Second. The solicitor for the defendants William B. Duncan, David Duncan, and William Watts Sherman, stipulates and agrees that the

statement of the account hereto annexed, in respect to the said then last-named defendants, is correct according to the said decree.

Third. The solicitors for the defendant The National City Bank stipulate and agree that the statement of the account hereto annexed, in respect to the said National City Bank, is correct according to the
260 directions of the said decree.

These stipulations are in lieu of, and as a substitute for, and to have the like effect as the report of a master, pursuant to and as directed by the said decree, and to be without prejudice to any proceedings that may be taken to review the said or any decree herein any more or further than would be the report of a master in accordance with the provisions of said decree.

Further proceedings herein may be taken in like manner as might be done upon the report of a master, in due form under the decree to the like effect as this stipulation.

Statement above referred to in respect to the defendant Samuel Jaudon.

U. S. stocks		$5,600
Interest		1,176
Total amount due in gold		$6,776 00
Amount due from Duncan, Sherman & Co		$11,689 23
Amount due from the National City Bank		7,911 97
		$19,601 20
Credits by decree	$585	
	205	790
Total amount due, in currency		$18,811 20

Statement above referred to in respect to the defendants, William Butler Duncan, David Duncan, and William Watts Sherman.
261

Proceeds of sale					$8,699 12
Next dividend, Feb'y, 1868, 70×5=350			int. 3.4	$81 67	431 67
Aug.		350	2.10	69 42	419 42
Feb.	'69	350	2.4	57 17	407 17
Aug.		350	1.10	44 92	394 92
Feb.	'70	350	1.4	32 67	382 67
Aug.		350	.10	20 42	370 42
Feb.	'71	350	.4	8 17	358 17
Aug. 1, '69. Right to subscribe for (15%) say 10 shares new stock, worth 1 20—$200. Int. 1 10. 25 67					225 67
					$11,689 23

Statement above referred to in respect to the defendants The National City Bank.

Proceeds of sale					$5,897 90
Next dividend, Feb. '68, 47×5=235			Int. 3.4	$54 83	289 83

Aug.	235	2.10	46 61	281 61
Feb. '69,	235	2.4	38 38	273 38
Aug.	235	1.10	30 16	265 16
Feb. '70,	235	1.4	21 93	256 93
Aug.	235	.10	13 71	248 71
Feb. '71,	235	.4	5 48	240 48

Aug. 1, '69. Right to subscribe for (15%) say 7 shares new stock worth 120—$140. Int. 1 10. $17 97..... 157 97

7,911 97

BOWDOIN, LAROCQUE & BARLOW,
Sol'rs for Duncan & Sherman.
MERRIHEW & ARNOUX,
Att'ys for National City Bank.
262 JOHN P. CROSBY, *Sol'r for S. Jaudon.*
STRONG AND SHEPARD, *Sol'rs for Compl't.*

Dated New York City, May 31st, 1871.

(Endorsed:) U. S. circuit court. Mary T. B. Jaudon vs. Samuel Jaudon & others. Stipulation. Strong & Shepard, sol'rs for compl'ts, 90 Broadway, N. Y.

263 *Complainant's costs on decree.*

U. S. circuit court.

MARY T. B. JAUDON
vs.
SAMUEL JAUDON ET AL.

By statute		$20
Depositions:		
Cartwright	$2 50	
S. Jaudon	2 50	
Duncan	2 50	
Conover	2 50	
Walker	2 50	
Mrs. Jaudon	2 50	15
		35
Disbursements:		
Witness Conover	7 50	
Mrs. Jaudon	11 50	
S. Jaudon, 2 days	3	
Cartwright	1 50	
Duncan	1 50	
Walker	1 50	
Paid commissioner	53 65	
Postage, &c.	3 00	
Over	$83 15	$35

Brought over	83	15	$35
Copies demurrer	1	25	
answer	2	80	
decision	4	50	
order overruling demurrer		50	
order for taking testimony		50	
Marshal's fees, serving subpœnas	10	60	
264 (Other items, if any, to be inserted on taxation.)			
Clerk's fees	69	50	
Subpœnas	6	55	
Note of issue, Feb. '70	2		
Oct. '70	2	50	
Feb. '71	3		
Subpœnas to witnesses	2	70	189 55
			$224 55
(Other items to be inserted on taxation.)			4 50
			$220 05

Taxed at two hundred and twenty $\frac{05}{100}$ dollars this 1st June, 1871.

R. E. STILWELL,
Dep. Clerk.

The foregoing bill of costs of the complainant herein will be presented to the clerk of this court for taxation June 1st, 1871, at 11 a. m. May 29, 1871.

Y'rs,

STRONG & SHEPARD,
Complainant's Sol'rs.

To the solicitors for the defendants.

(Endorsed.) U. S. circuit court. Jaudon vs Jaudon. Pl'ff's costs. Strong & Shepard, sol'rs for compl't, 90 Broadway.

29TH MAY 1871.—Due service of copy of the within admitted.

BOWDOIN, LAROCQUE & BARLOW,
Att'ys for Def'ts Duncan, Sherman & Co.
MERRIHEW & ARNOUX, *Att'ys for City Bank.*
JOHN P. CROSBY, *Sol'r for S. Jaudon.*

265 United States circuit court, southern district of New York.

MARY T. B. JAUDON, COMPLAINANT,
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, David Duncan, William Watts Sherman, The National City Bank, & Charles B. Jaudon, defendants.

To the honorable the Supreme Court of the United States:

The appeal of William B. Duncan, David Duncan, and William Watts Sherman, defendants in the above-entitled cause, and appellants, respectfully represents:

That, heretofore, to wit, on the twelfth day of October, 1869, the above plaintiff filed her bill in the circuit court of the United States for the southern district of New York, against these defendants and appellants,

and the other defendants above named therein, alleging, in substance, that she was a resident of Philadelphia, in the State of Pennsylvania, and the wife of Charles B. Jaudon, and the daughter of the late Commodore Bainbridge, of the city of Philadelphia, who died in the
266 year one thousand eight hundred and thirty-three, leaving a will which was duly proved in the office of the register of wills in and for the city and county of Philadelphia, on the second day of August, one thousand eight hundred and thirty-three; that the said testator directed the trustees of the residue of the estate, appointed in and by his said will, to invest a portion thereof in trust, the interest thereof to be paid to the said plaintiff, Mary T. Bainbridge, for her sole use and benefit, during her natural life, and at the end of her natural life the amount so invested to be equally divided between her children.

That, afterwards, on the twenty-ninth day of May, one thousand eight hundred and thirty-five, the defendant Samuel Jaudon was appointed by the court of common pleas of the city and county of Philadelphia, as trustee in the place and stead of the trustees named in the said will; that the said Samuel Jaudon, since his appointment., has acted, and still continues to act, has been, and still continues to be, the trustee of the plaintiff, and as such held, on or about the twenty-first day of October, 1867, for her benefit, among other things, one hundred and seventeen shares of the Delaware and Raritan Canal Company, of the full value of one hundred dollars each share, and of the actual value of over fourteen thousand dollars.

That those shares were entered and stood upon the books of
267 the said company in the name of Samuel Jaudon, as trustee of the plaintiff, and that a certificate or certificates were issued and delivered to him for the said shares, showing on their face that they were issued to him as her trustee. That said Samuel Jaudon also held, previous to, on, or about the fifteenth day of June, A. D. one thousand eight hundred and sixty-eight, as such trustee, for the plaintiff, five thousand six hundred dollars of the United States loans, commonly called five-twenties, with interest coupons due after that date still attached thereto, of the value of more than six thousand eight hundred dollars.

That, afterwards, and without the knowledge or consent of the said plaintiff, the said Samuel Jaudon disposed of the whole amount of the said United States loans, and appropriated the proceeds to his own use and benefit. That, in the latter part of the year one thousand eight hundred and sixty-seven, the said Samuel Jaudon, by the aid of these defendants, designated in said bill by their firm-name of Duncan, Sherman & Company, and of the said National City Bank, contrary to his duty as trustee, and in breach of his trust, disposed of, and misapplied the said shares of stock, then being of the value as aforesaid, for his own benefit and use, to the advantage and gain of these appellants, the said Duncan, Sherman and Company and the said National City
268 Bank; and these appellants, and the said National City Bank, knowing that the said Samuel Jaudon held the said securities in trust for the complainant. That, some time in the month of October, one thousand eight hundred and sixty-seven, the said Samuel Jaudon hypothecated with these appellants a certificate or certificates for a part of the aforesaid shares of stock held by him as trustee for the complainant, seventy shares or thereabouts, as security for the repayment to these appellants of a certain sum or sums of money, then or previously loaned by them to the said Samuel Jaudon, on his own individual account. That the said shares of stock were sold or caused to be sold by these appellants to some person or persons unknown to the com-

plainant, and the proceeds thereof applied to the extinguishment of the said private indebtedness of the said Samuel Jaudon, to these appellants. That the said seventy shares, or thereabouts, of the said stock were then of the value of more than nine thousand dollars, and that, on or about the fifth December, 1867, the said Samuel Jaudon pledged or hypothecated with the said defendants The National City Bank, a certificate or certificates of certain other shares of the said stock held by him in his name as trustee of the complainant, to the number of forty-
seven, or thereabouts, as security for the repayment to the said
269 bank of a sum or sums of money, then or previously loaned or
furnished by the said bank to the said Samuel Jaudon, on his individual account. That the said bank afterwards sold, or caused to be sold and transferred to some person unknown to the complainant, the said shares, and applied the proceeds of such sale to the payment of the debt of the said Samuel Jaudon to the said bank. That the matter in dispute in the said bill exceeded the amount of twenty thousand dollars, besides costs, and praying that the said defendant Samuel Jaudon might be decreed to account for the value of the United States securities so appropriated by him to his own use, together with interest, and also for the value of the said one hundred and seventeen shares of stock so misappropriated by him. That the defendants Duncan, Sherman and Company might be decreed to account for and restore to the trust the said shares of stock hypothecated with them, and subsequently sold by them, together with all dividends since declared, and interest; or, that they be decreed to pay the value thereof into this court. That the defendants the said National City Bank might be decreed to account for and restore to the trust the shares of stock hypothecated
with them, together with all dividends thereon since declared,
270 that they be decreed to pay the value thereof into this court.

That these defendants and the defendant The National City Bank each duly interposed their demurrer to the said bill of complaint, which said demurrers were severally overruled, and leave was thereupon granted said defendants to answer the said bill.

That these defendants duly and on the sixth day of June, 1870, filed their joint answer to the said bill of complaint therein, and thereby alleging in substance, that on or about the eighteenth of July, 1867, Samuel Jaudon applied to these defendants at their banking-house in the city of New York, in the regular course of business for a loan of seven thousand dollars, and offered as security therefor seventy shares of the stock of the Delaware and Raritan Canal Co.; that the application for the said loan was made to the defendant William B. Duncan in person, who knowing the value of the stock, and knowing the security offered to be sufficient, directed the loan to be made, and thereupon the certificates of the said shares of stock having endorsed thereon a power of attorney, in the usual form to transfer, duly executed by the said
Samuel Jaudon, were handed to one of the clerks in the banking-
271 house of these defendants, and the sum of seven thousand dollars
advanced to the said Jaudon upon the pledge and security thereof; that these defendants nor either of them, made a careful examination of the said certificates, and did not observe and had no knowledge that the same were issued to the said Samuel Jaudon as trustee, as in the complainant's bill of complaint alleged, but that these defendants had been informed and believed the fact to be that the said certificates of stock were issued to the said Samuel Jaudon as in the complainant's bill was charged; that, afterwards, on the sixteenth day of October, 1867, these defendants loaned to the said Samuel Jaudon the further sum of six hun-

dred dollars upon the security of said stock, making in all seven thousand six hundred dollars, so loaned; that the said stock was sold by these defendants, on or about the twenty-first of October, by the direction of the said Samuel Jaudon in the regular course of business, and that the amount realized therefrom was eight thousand six hundred and ninety-nine dollars and twelve cents, and that by the like direction of the said Samuel Jaudon, the amount loaned to him upon the security of the said stock as aforesaid, amounting with interest to seven thousand seven hundred and twenty-nine dollars and eighty-eight cents was
272 deducted from the said proceeds, leaving a balance due to the said Samuel Jaudon of nine hundred and sixty-nine dollars and twenty-four cents which, on the day last aforesaid, was paid to him by these defendants.

That these defendants had not at any time any knowledge or information of any actual or intended breach of trust on the part of the said Samuel Jaudon in dealing as aforesaid with the said stock, nor did they have any reason to believe that any such breach of trust had been or would be committed by the said Samuel Jaudon; and that, *and* save as in the said answer before stated, these defendants respectively had no knowledge or information in the premises whatsoever; and these defendants insist that they were bona-fide purchasers of the said stock for a good and valuable consideration, without any notice of any actual or intended breach of trust on the part of the said trustee, and without any other notice of the existence of any trust whatsoever, except so far, and so far only, as notice thereof was to be imputed to them by law, upon the facts herein before stated, and praying the same benefit and advantage from the facts alleged in their answer, as if the same had been pleaded in bar to the complainant's bill.

273 That, afterwards, to wit, on the tenth day of May, 1871, and after due hearing of the counsel for complainant and defendants, respectively, the said court made and entered an interlocutory decree therein and thereby adjudging in substance, that the said defendant Samuel Jaudon, the said defendant The National City Bank, and these defendants, appellants, should respectively account as prayed for in the said bill, and directing that it be referred to a master to take and state such account.

That, afterwards, on the twenty-seventh day of May, 1871, the parties respectively agreed and stipulated as to the several sums that would be due from the defendants, respectively, upon the footing of the interlocutory decree directing a reference to a master to state an account, and thereupon such stipulation was received by the court as and for and in lieu of the report of the master.

That, on the first day of June, 1871, a final decree was made and pronounced in the cause, wherein it was, in substance, adjudged and decreed among other things, that the amount due from these defendants appellants to the said complainant, was the sum of eleven thousand six hundred and eighty-nine $\frac{23}{100}$ dollars, and that the defendants appellants forthwith restore to the said trust the said seventy shares of
274 stock, and bring them into court; and, in default thereof, that these defendants pay into court the said sum of eleven thousand six hundred and eighty-nine $\frac{23}{100}$ dollars, with interest thereon from the fifteenth day of June, 1871; and that the defendants pay to the complainant her costs; and that the complainant have execution for her costs and for the sum above decreed.

Wherefore these appellants appeal from the whole of said decree of said circuit court of the United States or so much thereof as relates to

these defendants, or in which they have any interest; and respectfully pray that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed, and a decree made dismissing said bill with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, 9th June, 1871.

BOWDOIN, LAROCQUE & BARLOW,
Solicitors for Appellants.

W. W. MACFARLAND,
Of Counsel.

275 (Endorsed:) U. S. circuit court, southern district of N. Y. Mary T. B. Jaudon against Samuel Jaudon, William B. Duncan, & o'rs. Petition of appeal. Bowdoin, Larocque & Barlow, sol'rs for def'ts & appell'ts, W. B. Duncan & o'rs. Filed June 9, 1871.

276

277 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

MARY T. B. JAUDON, APPELLEE,
vs.
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon, appellants.

Know all men by these presents that we, William Butler Duncan, Francis H. Grain, and Samuel L. M. Barlow, of the city, county, and State of New York, are held and firmly bound unto the above-named Mary T. B. Jaudon, in the sum of fifteen thousand dollars, to be paid to the said Mary T. B. Jaudon; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the ninth day of June, in the year of our Lord one thousand eight hundred and seventy-one.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, District of Columbia, to reverse the decree rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make such appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. BUTLER DUNCAN. [L. S.]
FRANCIS H. GRAIN. [L. S.]
SAMUEL L. M. BARLOW. [L. S.]

Sealed and delivered and taken and acknowledged this 9th day of June, 1871, before me.

EDWARD L. OWEN,
U. S. Commissioner.

278 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Francis H. Grain and S. L. M. Barlow, being duly sworn, doth depose and say, and each for himself says that he is worth the sum of thirty thousand dollars over and above all his just debts and liabilities.

FRANCIS H. GRAIN.
SAMUEL L. M. BARLOW.

Sworn to this 9th day of June, A. D. 1871, before me.

EDWARD L. OWEN,
U. S. Commissioner.

(Indorsed:) Vol. , page . U. S. circuit court. Mary T. B. Jaudon, appellee, vs. Samuel Jaudon, William Butler Duncan, David Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon, appellants. Bond for costs and damages on appeal. Bowdoin, Larocque & Barlow, solicitors for W. B. Duncan & others, def't's & appellants. Filed this 12th day of June, 1871.

The within bond is approved as to its form and amount and the sufficiency of the sureties. June 10, 1871.

SAM'L BLATCHFORD,
District Judge.

279 By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, to Mary T. B. Jaudon:

Whereas William Butler Duncan, David Duncan, and William Watts Sherman have lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said Mary T. B. Jaudon, and have filed the security required by law, you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the tenth day of June, in the year of our Lord one thousand eight hundred and seventy-one.

SAM'L BLATCHFORD.

280 (Endorsed:) U. S. Supreme Court. Mary T. B. Jaudon ag'st Samuel Jaudon, William B. Duncan, and others. Bowdoin, Laroque & Barlow, sol'rs for W'm B. Duncan & o'rs, def'ts and appellants.

Due service of a copy of the within original citation is hereby admitted. Dated New York, June 10, 1871.

STRONG & SHEPARD,
Pl'ff's Sol'rs.

Filed 12th June, 1871.

281 United States circuit court, southern district of New York.

MARY T. B. JAUDON, BY HENRY M. TABER, her next friend, complainant,
against
SAMUEL JAUDON, WILLIAM B. DUNCAN, DAVID Duncan, William Watts Sherman, The National City Bank, and Charles B. Jaudon, defendants.

To the honorable the Supreme Court of the United States:

The appeal of The National City Bank, defendants in the above-entitled cause, and appellants, respectfully represents: That, heretofore, to wit, on the 12th day of October, 1869, the above-named plaintiff filed her bill in the circuit court of the United States for the southern district of New York, against these defendants and appellants, and the other defendants above named therein, alleging, in substance, that she was a resident of Philadelphia, in the State of Pennsylvania, and the wife of Charles B. Jaudon, and the daughter of the late Commodore Bainbridge, of the city of Philadelphia, who died in the year one
282 thousand eight hundred and thirty-three, leaving a will which was duly proved in the office of the register of wills in and for the city and county of Philadelphia, on the second day of August, one thousand eight hundred and thirty-three; that the said testator directed the trustees of the residue of the estate, appointed in and by his said will, to invest a portion thereof on trust, the interest thereof to be paid to the said plaintiff, Mary T. Bainbridge, for her sole use and benefit during her natural life, and at the end of her natural life, the amount so invested to be equally divided between her children; that, afterwards, on the twenty-ninth day of May, one thousand eight hundred and thirty-five, the defendant Samuel Jaudon was appointed by the court of common pleas of the city and county of Philadelphia, as trustee, in the place and stead of the trustees named in the said will; that the said Samuel Jaudon, since his appointment, has acted, and still continues to act, has been, and still continues to be, the trustee of the plaintiff, and, as such, held, on or about the twenty-first day of October, 1867, for her benefit, among other things, one hundred and seventeen shares of the Delaware and Raritan Canal Company, of the full value of one hundred dollars each share, and of the actual value of over fourteen thousand dollars.

283 That those shares were entered and stood upon the books of the said company in the name of Samuel Jaudon, as trustee of the plaintiff, and that a certificate or certificates were issued and delivered to him for the said shares, showing on their face that they were issued to him as her trustee. That said Samuel Jaudon also held, previous to on about the fifteenth day of June, A. D. one thousand eight hundred and sixty-eight, as such trustee for the plaintiff, five thousand and six hundred dollars of the United States loans, commonly called five-twenties, with interest coupons due after that date still attached thereto, of the value of more than six thousand eight hundred dollars. That, afterwards, and without the knowledge or consent of said plaintiff, the said Samuel Jaudon disposed of the whole amount of the said United States loans, and appropriated the proceeds to his own use and benefit. That, in the latter part of the year one thousand eight hundred and sixty-seven, the said Samuel Jaudon, by the aid of these defendants The National City Bank, and of the other defendants designated in said

bill by their firm-name of Duncan, Sherman and Company, contrary to his duty as trustee, and in breach of his trust, disposed of and misapplied the said shares of stock, then being of the value as aforesaid, for his own benefit and use, to the advantage and gain of the said
284 Duncan, Sherman and Company, and these appellants the said National City Bank, and these appellants, and the said Duncan, Sherman and Company, knowing that the said Samuel Jaudon held the said securities in trust for the complainant. That, some time in the month of October, one thousand eight hundred and sixty-seven, the said Samuel Jaudon hypothecated with the defendants, designated as Duncan, Sherman & Company, a certificate or certificates for a part of the aforesaid shares of stock held by him as trustee for the complainant, seventy shares or thereabouts, as security for the repayment to Duncan, Sherman and Company of a certain sum or sums of money then or previously loaned by them to the said Samuel Jaudon on his own individual account. That the said shares of stock were sold or caused to be sold by said Duncan, Sherman and Company to some person or persons unknown to the complainant, and the proceeds thereof applied to the extinguishing of the said private indebtedness of the said Samuel Jaudon to said Duncan, Sherman and Company. That the said seventy shares, or thereabouts, of the said stock were then of the value of more than nine thousand dollars, and that, on or about the fifth December, 1867, the said Samuel Jaudon pledged or hypothecated with these appellants, The National City Bank, a certificate or certificates of
285 certain other shares of the said stock held by him in his name as trustee of the complainant to the number of forty-seven, or thereabouts, as security for the repayment to the said appellants of a sum or sums of money then or previously loaned, or furnished by the said appellant to the said Samuel Jaudon on his individual account.

That the said appellants afterwards sold or caused to be sold and transferred to some person unknown to the complainant, the said shares, and applied the proceeds of such sale to the payment of the debt of the said Samuel Jaudon to the said bank. That the matter in dispute in the said bill exceeded the amount of twenty thousand dollars besides costs, and praying that the said defendant Samuel Jaudon might be decreed to account for the value of the United States securities so appropriated by him to his own use, together with interest; and also, for the value of the said one hundred and seventeen shares of stock so misapp'riated by him; that the defendants Duncan, Sherman and Company might be decreed to account for, and restore to the trust the said shares of stock hypothecated with them, and subsequently sold by them, together with all dividends since declared and interest, or that they be decreed to pay the value thereof into this court.

286 That the defendants the said National City Bank might be decreed to account for and restore to the trust the shares of stock hypothecated with them, together with all dividends thereon since declared, or that they be decreed to pay the value thereof into this court.

That these defendants and the defendants William B. Duncan, David Duncan, and William Watts Sherman, each duly interposed their demurrer to the said bill of complaint, which said demurrers were severally overruled, and leave was thereupon granted said defendants to answer the said bill.

That these defendants duly, and on the 6th day of June, 1870, filed their answer to the said bill of complaint, and therein and thereby in substance alleged that, on the 21st day of October, 1866, Samuel Jaudon

pledged with these defendants a certificate of forty-seven shares of stock of the Delaware and Raritan Canal Company.

That, on or about the 14th day of January, 1867, said shares of stock were sold by these defendants or through their agency. That, at the time of the said delivery of said certificate of stock to them by said Jaudon, and in consideration thereof, the defendants paid to said Jaudon the sum of $9,500; that repayment of said loan was duly de-
287 manded of said Jaudon; that he failed to pay the same, and that they caused said stock to be sold, and after reimbursing themselves they repaid to said Jaudon whatever surplus remained; that said certificate of stock had a power of attorney attached signed by said Samuel Jaudon; that these defendants delivered said certificate so endorsed and signed, and the stock was transferred directly from said Samuel Jaudon to the purchaser, and that said certificate did not show upon its face who was the person for whom it was held in trust; that these defendants did not know for whom the said shares were held by said Samuel Jaudon.

That these defendants had not at any time any knowledge or information of any actual or intended breach of trust on the part of the said Samuel Jaudon in dealing as aforesaid with the said stock, nor did they have any reason to believe that any such breach of trust had been or would be committed by the said Samuel Jaudon, and that, and save as in the said answer before stated, these defendants, respectively, had no knowledge or information in the premises whatsoever. And these defendants insist that they were bona-fide purchasers of the said stock for a good and valuable consideration, without any notice of any actual or intended breach of trust on the part of the said trustee, and with-
288 out any other notice of the existence of any trust whatsoever, except so far only as notice thereof was to be imputed to them by law upon the facts hereinbefore stated, and praying the same benefit and advantage from the facts alleged in their answer, as if the same had been pleaded in bar to the complainants' bill.

That, afterwards, to wit, on the tenth day of May, 1871, and after due hearing, the counsel for complainant and defendants, respectively, the said court made and entered an interlocutory decree therein, and thereby adjudging in substance that the said defendant Samuel Jaudon, these defendants The National City Bank, and the defendants Duncan, Sherman & Company, should respectively account as prayed for in the said bill, and directing that it be referred to a master to take and state such account.

That, afterwards, on the twenty-seventh day of May, 1871, the parties, respectively, agreed and stipulated as to the several sums that would be due from the defendants, respectively, upon the footing of the interlocutory decree, directing a reference to a master to state an account, and thereupon such stipulation was received by the court as and for and in lieu of the report of the master.

289 That, on the first day of June, 1871, a final decree was made and pronounced in the cause, wherein it was in substance adjudged and decreed, among other things, that the amount due from these defendants, appellants, to the said complainant was the sum of seven thousand nine hundred and eleven $\frac{97}{100}$ dollars, and that the defendants, appellants, forthwith restore to the said trust the said forty-seven shares of stock and bring them into court; and in default thereof that these defendants pay into court the said sum of seven thousand nine hundred and eleven $\frac{97}{100}$ dollars, with interest thereon from the first day of June, 1871, and that the defendants pay to the complainant her

costs, and that the complainant have execution for her costs and for the sum above decreed.

Wherefore these appellants appeal from the whole of said decree of said circuit court of the United States, or so much thereof as relates to these defendants, or in which they have any interest, and respectfully pray that the decree of the said circuit court, and the bill, answer, pleadings, depositions, evidence, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof
290 may be reversed, and a decree made dismissing said bill with costs, or such other decree as to the said Supreme Court shall seem just.

Dated New York, 9th June, 1871.

MERRIHEW & ARNOUX,
Solicitors for Appellants.

WILLIAM H. ARNOUX,
Of Counsel.

(Endorsed:) United States circuit court, southern district of New York. Mary T. B. Jaudon, by Henry M. Taber, her next friend, against The National City Bank, impleaded, &c. Petition of appeal. Merrihew & Arnoux, solicitors for def't The National City Bank, 271 Broadway. Filed June 10, 1871.

291 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

MARY T. B. JAUDON, BY HENRY M. TABER, HER next friend, appellee,
vs.
THE NATIONAL CITY BANK, IMPLEADED, &C., appellant.

Know all men by these presents that we, Moses Taylor and Samuel Sloan are held and firmly bound unto the above-named Mary T. B. Jaudon in the sum of fifteen thousand dollars, to be paid to the said Mary T. B. Jaudon; for the payment of which well and truly to be made we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated the tenth day of June, in the year of our Lord one thousand eight hundred and seventy one.

Whereas the above-named The National City Bank has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit, by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named The National City Bank shall prosecute the appeal to effect, and answer all damages and costs if the' shall fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

MOSES TAYLOR. [L. S.]
SAM. SLOAN. [L. S.]

Sealed and delivered and taken and acknowledged this 10 day of June, 1871, before me.

[L. S.] WM F. MACKAE.
Notary Public N. Y. Co.

292 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Moses Taylor and Samuel Sloan, being duly sworn, doth depose and say that they are each worth the sum of thirty thousand dollars, over and above all their, and each of their, just debts and liabilities.

MOSES TAYLOR.
SAM. SLOAN.

Sworn to this 10th day of June, A. D. 1871, before me.

[L. S.] WM F. MACKAE,
Notary Public N. Y. Co.

(Indorsed:) Vol. , page . U. S. circuit court. Mary T. B. Jaudon vs. The National City Bank. Bond for costs on appeal. Merrihew & Arnoux, solicitors for app'l't. Filed this 12 day of June, 1871.

The within bond is approved as to its form and amount, and the sufficiency of the sureties. June 10, 1871.

SAM'L BLATCHFORD,
District Judge.

293 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, to Mary T. B. Jaudon:

Whereas The National City Bank has lately appealed to the Supreme Court of the United States from a decree lately rendered in the circuit court of the United States for the southern district of New York, made in favor of you, the said Mary T. B. Jaudon, and has filed the security required by law: You are therefore cited to appear before the said Supreme Court at the city of Washington, on the first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of New York, in the southern district of New York, in the second circuit, the 10th day of June, in the year of our Lord one thousand eight hundred and seventy-one.

SAM'L BLATCHFORD.

294 (Endorsed:) U. S. circuit court. Mary T. B. Jaudon vs. The National City Bank. Citation. Merrihew & Arnoux, solicitors for app'l'ts. Filed June 12, 1871.

Due service of a copy of the within citation admitted this 10th day of June, 1871.

STRONG & SHEPARD,
Sol'rs for Compl't.

(Indorsement on cover:) No. 562. William B. Duncan, David Duncan, and William Watts Sherman, appellants, vs. Mary T. B. Jaudon, and No. 563, The National City Bank vs. Mary T. B. Jaudon. S. New York C. C. U. S. Filed 14th September, 1871.